93-423

No. 93-42

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

STAVROS KATSIS,

Petitioner,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an applicant for relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), is barred, as a question of law, from administrative reopening for consideration of material new evidence, an issue on which the courts of appeals are in direct conflict.

2. Whether a non-statutory federal board's interpretation of the deportation statute it administers requires judicial deference under this Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where this Court itself has not granted such judicial deference in the interpretation of statutory language in deportation proceedings, *e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) and *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

3. Whether a court of appeals under this Court's holding in *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should defer to a decision of the Board of Immigration Appeals, an inferior nonstatutory administrative unit of the Department of Justice, in the interpretation of deportation laws, where the Attorney General, as the agent statutorily charged with interpretation and administration of the deportation laws, has issued a prior published administrative precedent to the contrary.

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1. August 9, 1993 Order of the Third Circuit denying rehearing;

2. July 6, 1993 Opinion and Order of the Third Circuit (not yet published) denying Petition for Review and affirming the Board of Immigration Appeals' Decision of September 16, 1992.

3. September 16, 1992 Decision and Order of the Board of Immigration Appeals, denying Petitioner's Motion to Reopen.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 6, 1993. A petition for rehearing was denied on August 9, 1993 and this Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20) provides:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) [defining classes of excludable aliens]. . . .

This section is interpreted to apply in deportation proceedings. The interpretation is national (July 6, 1993 Opinion of Third Circuit and authorities cited therein.) The applicability of this section is not in issue. The issue relates to the term "lawfully admitted for permanent resident", as defined by 8 U.S.C. § 1101(a)(20) and as used in § 1182(c).

STATEMENT OF THE CASE

Petitioner Stavros Katsis, a Greek national and citizen, was admitted to the United States as a lawful permanent resident on February 1, 1983. On March 29, 1988, he was convicted of a controlled substance violation. On the basis of this conviction, deportation proceedings were begun on January 4, 1989.

At trial, deportability was agreed. Petitioner filed for relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), which permits aliens "lawfully admitted for permanent residence" and having "a lawful unrelinquished domicile of seven consecutive years" to apply for this discretionary relief from deportation. The Immigration and Naturalization Service ("INS") did not contest Petitioner's

statutory eligibility for § 212(c) relief. The issue presented was the appropriateness of the exercise of discretion. The Immigration Judge denied relief in the exercise of discretion, having first found Katsis statutorily eligible for that remedy.

A timely appeal was taken to the Board of Immigration Appeals ("Board"). The Board issued its decision denying relief on September 3, 1991.

Prior counsel petitioned for review of the Board's Order by the Court of Appeals for the Third Ciruit. On July 17, 1992 the Third Circuit affirmed the Board's decision, by unpublished Memorandum Opinion.

A Motion to Reopen Proceedings under 8 C.F.R. §§ 3.2 and 3.8 was submitted to the Board on August 17, 1992 by present counsel. The Board denied relief. Significantly, the Board acknowledged that there were important equitable factors which had arisen since the original hearing and which supported the exercise of discretionary relief. However, the Board now found Petitioner statutorily ineligible for this relief, holding:

> A respondent who is subject to an administratively final order of deportation cannot successfully move to reopen deportation proceedings to apply for relief under § 212(c) of the Act. As such, a respondent is no longer a lawful permanent resident of this country.

A Petition for Review of the Board's Order was timely filed with the Third Circuit Court of Appeals. It denied the Petition on July 6, 1993. A Petition for Rehearing was denied on August 9, 1993.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the Court of Appeals below was based on 8 U.S.C. § 1105a(a) and this Court's holding in *Giova v. Rosenberg*, 397 U.S. 18 (1964) (Court of Appeals can review an order of the Board denying a motion to reopen an order of deportation, as a final order of deportation).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS REGARDING THE INTERPRETATION OF 8 U.S.C. §§ 1101(a)(20) and 1182(c), YIELDING OPPOSITE RESULTS DEPENDING SOLELY ON THE CIRCUIT IN WHICH A FINAL ORDER OF DEPORTATION IS REVIEWED.

Discretionary relief under Section 212(c) of the Act is available only to lawful permanent residents as defined by Section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20). This status is accorded to any alien who has attained lawful permanent resident status, "such status not having changed." The "change" of this status is critical. If the status has not changed, the alien can apply to the Board for further consideration based on facts arising since the record was closed. The Board may then reopen the proceeding in its discretion. If the status has changed, the alien is no longer eligible for the remedy even though eligibility had been established by an application submitted at trial. In the instant case, the Board followed its prior decision in *Matter of Cerna*, Int. Dec. 3161, 1991 WL 353528 (BIA October 7, 1991), which held that the change in status took place when its own order became administratively final. The Board also suggested, by its language, that had it not so held as a question of law, it would have granted relief in this case.

The courts of appeal are markedly divided as to what event causes the loss of lawful permanent resident status in the context of interpreting Sections 101(a)(20) and 212(c). Some courts uphold the Board's "administratively final order of deportation" test. *See, e.g., Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987); *Variamparambil v. INS*, 831 F.2d 1352 (7th Cir. 1987). However, the contrary view has prevailed in the Ninth and Seco d Circuits. *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (en banc); *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991).

In *Butros*, the Ninth Circuit overruled its prior holding in *Gonzalez v. INS*, 921 F.2d 236 (9th Cir. 1990) and "switched sides." *Butros* held that the provisions of 8 C.F.R. § 3.2 provide reopening to consider facts arising after the hearing, and therefore the Board's decision (that a deportable alien lost permanent resident status when the deportation order became administratively final) impermissibly contravened the regulation.

In the Eleventh Circuit, accrual of time for qualification, not in issue here, terminates with commencement of deportation proceedings. *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984). However, the issue of reopening of proceedings has not yet been reached by the Eleventh Circuit. From its position in *Marti-Xiques, supra*, and *Barbe v. INS*, 886 F.2d 306 (11th Cir. 1989), *cert. denied*, 495 U.S. 929 (1990), it appears that the Eleventh Circuit might agree with the reasoning in *Butros*.

In *Matter of Cerna* itself, the Eleventh Circuit never reached the instant issue on its merits. The case on which the Board relies was approved on wholly alternate grounds. *Cerna v. INS*, Nos. 91-5054 and 91-5055 (11th Cir. Nov. 9, 1992) (reproduced as Appendix D hereto).

Section 212(c) provides the only relief in deportation proceedings arising from controlled substance or weapons offenses.

It is available in the discretion of the Immigration Judge only to long-time permanent residents who demonstrate unusual equities: rehabilitation, dependent family, etc. Aliens residing in a state within the Second or Ninth Circuits can demonstrate these equities in any proceeding prior to physical deportation. But an alien who happens to reside in a state of the Third Circuit is barred from introducing such evidence once the Board has entered a final order, even if this order is appealed to the federal courts.[1] In the interim period, much may have changed in the alien's life, but as a matter of law it cannot be considered in the Third Circuit. The alien and his family must suffer the harsh consequences of deportation; the court is deprived of discretion.

In considering this Petition for Certiorari, it is significant that the Board itself attached a special appendix to its opinion in *Cerna*, critiquing the lack of uniformity among the circuits on this issue. Judge Trott, dissenting in *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993), lamented at length the conflict among the circuits. He too voiced a prayer that this Court would correct the problem that the "INS continues to be pulled in all directions at once by fractious circuits."

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1. It appears that if a court of appeals were to reverse a final order of the Board, the Board would consider lawful permanent resident status as reinstated, although there is no statutory basis for such reinstatement. This inconsistency of the Board's position is an issue to be addressed on the merits.

II.

THE COURT OF APPEALS HAS FAILED TO FOLLOW THIS COURT'S HOLDINGS IN *CARDOZA-FONSECA* AND *ELIAS-ZACARIAS*, IN THAT IT WHOLLY DEFERRED TO THE DECISION OF A NON-STATUTORY DEPARTMENTAL BOARD ON A QUESTION OF STATUTORY CONSTRUCTION.

An agency's interpretation of the statute it administers is subject to limited judicial review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* held that courts should defer to agency interpretations of the statutes committed to them for enforcement. *Chevron* was decided in 1984. It was followed by *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In deciding *Cardoza-Fonseca* in 1987, Justice Stevens for the Court cited *Chevron* beginning at page 446, but went on to focus on the authority of the Court as the final authority in issues of statutory construction involving clear congressional intent.

In *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), this Court decided an important question of statutory interpretation relating to asylum in deportation proceedings; *Chevron* was neither mentioned nor even noted.

The treatment of *Chevron* in deportation cases such as *Cardoza-Fonseca* and *Elias-Zacarias* suggests that the application of *Chevron* is narrower than the Third Circuit has stated here.

Several commentators have noted the numerous exceptions to *Chevron*. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992). Professor Merrill, analyzing *Chevron*-implicated cases decided by this Court between 1984 and 1990, found that only one-third of these decisions actually applied

Chevron. Id. at 981. He interprets *Cardoza-Fonseca* as avoiding *Chevron* where the issue is purely one of law.

The Court is invited to compare its decision in *INS v. Phynpathia*, 464 U.S. 183 (1984), decided earlier in the same term as *Chevron*. In *Phynpathia*, this Court not only did not defer to the same Board of Immigration Appeals; it overrode a long period of administrative interpretation as contrary to specific statutory language.

In *Matter of S.*, 6 I.&N. Dec. 392 (BIA 1954) (affirmed Attorney General March 15, 1955) on which Petitioner relied below, the Board's and the Attorney General's interpretation of § 101(a)(20) gave effect to congressional intent to preserve permanent resident status throughout deportation proceedings. That intent was clearly expressed at the time the United States immigration and nationality laws received intense and comprehensive congressional attention during the recodification resulting in the 1952 Act.

The case to which the Third Circuit defers, *Matter of Cerna*, Int. Dec. 3161, 1991 WL 353528 (BIA October 7, 1991), not only failed to consider that legislative purpose but held contrary to it. In its rush to do justice to *Chevron*, the Court of Appeals below failed to honor this Court's holding in *Cardoza-Fonseca*. *Cardoza-Fonseca* preserves the integrity of legislation as against agency interpretation where, as here, there is a conflict. *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

It is submitted that this Court's review is needed to end the apparent confusion as to the proper application of *Chevron* in the context of the issues decided in *Cardoza-Fonseca*, *Elias-Zacarias*, and perhaps *Phynpathia*.

III.

A CONSTRUCTION GIVEN TO THE IMMIGRATION AND NATIONALITY ACT BY THE ATTORNEY GENERAL SUPERSEDES AN INCONSISTENT CONSTRUCTION OF THAT STATUTE BY THE BOARD OF IMMIGRATION APPEALS, AND WARRANTS DEFERENCE, BOTH AS A MATTER OF STATUTORY CONSTRUCTION AND IN ACCORDANCE WITH THIS COURT'S HOLDING IN *CHEVRON.*

The Court of Appeals below applied the standard of review of agency statutory interpretation established by *Chevron, supra.* However, its application of *Chevron* is contrary to the administrative structure created by the Immigration and Nationality Act ("Act"). Unlike the administrative agency at issue in *Chevron*, the Board of Immigration Appeals was not established by the statute it administers and is not charged with enforcement of the Act. That responsibility is vested by 8 U.S.C. § 1103(a) in the Attorney General, specifically. The Board is a departmental entity created by the Attorney General. 8 C.F.R. § 3.1. That delegation of jurisdiction by the Attorney General in no way reduces her statutory authority as the officer responsible for administration of the immigration laws.

The Attorney General's construction of § 101(a)(20), and specifically the clause "such status not having changed", is that status as a lawful permanent resident is not lost until the alien voluntarily relinquishes that status or is physically deported. *Matter of S., supra.* The Attorney General has never overruled or retracted this construction of § 101(a)(20). The Board never sought the Attorney General's approval of its contrary position in *Cerna,* or in the instant case. *See* 8 C.F.R. § 3.1(h) providing for referral to the Attorney General.

As a creation of the Attorney General, the Board has no authority to interpret the Act contrary to the Attorney General's interpretation. The Board has done so in this case. If *Chevron* requires a reviewing court to defer to the "agency charged with enforcement", that agent to whom deference is due is the Attorney General. Instead, the Third Circuit deferred to the Board. This is contrary to the purpose and holding of *Chevron.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit in this case.

Respectfully submitted,

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September 15, 1993

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING DATED AUGUST 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3608

STAVROS KATSIS,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

On appeal from the
Immigration & Naturalization Service

No. 91-3858

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL

BEFORE: GREENBERG, NYGAARD,and ROSENN, *Circuit Judges*

The petition for panel rehearing filed by petitioner Stavros Katsis in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

Appendix A

BY THE COURT:
s/ M. Greenberg
Circuit Judge

DATED: August 9, 1993

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 6, 1993 DENYING PETITION FOR REVIEW AND AFFIRMING THE BOARD OF IMMIGRATION APPEALS' DECISION OF SEPTEMBER 16, 1992

Filed July 6, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3608

STAVROS KATSIS,

Petitioner

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

Appeal from the Immigration & Naturalization Service
No. 91-3858

Submitted Under Third Circuit Rule 12(6) June 11, 1993

Before: GREENBERG, NYGAARD,
and ROSENN Circuit *Judges*

Opinion Filed: July 6, 1993

Appendix B

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

In this case, an alien who was once lawfully admitted to the United States for permanent residence later became subject to an administratively final deportation order. After the entry of this final deportation order, the alien moved to reopen immigration proceedings to obtain discretionary relief from deportation. By statute, such relief is available only to aliens lawfully admitted for permanent residence. This petition for review presents the

question whether the Board of Immigration Appeals (BIA or Board) may deny as a matter of law a motion to reopen proceedings to obtain discretionary relief from deportation on the ground that the alien is no longer statutorily eligible for such relief because his status as an alien lawfully admitted for permanent residence changed when he became subject to an administratively final deportation order. Concluding that it may, we deny the petition for review.

I. BACKGROUND

Petitioner Stavros Katsis is a native and citizen of Greece. He was admitted to the United States as a lawful permanent resident in 1983. In 1988, he was convicted of a controlled substance violation, for which he served a prison term of approximately two years. Based on this conviction, in January 1989, Respondent Immigration and Naturalization Service (INS) commenced deportation proceedings against Katsis under section 241(a)(11) of the Immigration and Nationality Act (INA or Act), 8 U.S.C.A. § 1251(a)(11) (West 1970).

During a series of hearings in 1990 before various immigration judges (IJ), Katsis conceded deportability and applied for a waiver of deportability under section 212(c) of the Act, 8 U.S.CA. § 1182(c) (West 1993). Section 212(c) permits aliens "lawfully admitted for permanent residence" to apply for such a waiver. In November 1990, the IJ found Katsis deportable. At that same time, although finding Katsis to be statutorily eligible for a section 212(c) waiver, the IJ denied him the requested waiver on discretionary grounds after determining that the considerations favorable to permitting Katsis to remain in this country did not outweigh his conviction for a serious drug offense.

Appendix B

The IJ's finding of deportability was never appealed; however, in November 1990, Katsis appealed to the Board the IJ's denial of the section 212(c) waiver. The Board affirmed in September 1991. Katsis does not dispute the INS's assertion that he became subject to an administratively final deportation order when the Board affirmed the IJ's decision. Katsis petitioned this court for review of the Board's decision, and in an unpublished memorandum opinion, we affirmed. *Katsis v. INS*, 972 F.2d 1331 (3d Cir. 1992) (Rosenn, J.).

In August 1992, Katsis submitted a motion to the Board to reopen proceedings under 8 C.F.R. §§ 3.2 and 3.8. The motion set forth the existence of "new evidence that would serve to bolster his equities for a discretionary determination under section 212(c)" as required under those regulations. *In re Katsis*, BIA File No. A37 588 636, slip op. at 3 (Sept. 16, 1992). The Board denied this motion as a matter of law without reaching the discretionary aspect of the statute because it determined that Katsis was statutorily ineligible for waiver at the time he submitted his motion to reopen. *Id.* The Board so determined because it deemed he was no longer an alien "lawfully admitted for permanent residence" at the time he filed his motion to reopen, as required by section 212(c), in that he was then subject to an administratively final order of deportation.

Katsis timely filed a petition for review of this denial in this court.[1]

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1. The Board exercised jurisdiction over Katsis's motion to reopen pursuant to 8 U.S.C.A. § 1103 (West Supp. 1993); *Wolf v. Boyd*, 238 F.2d 249, 256 (9th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957). This court exercises jurisdiction to review the Board's decision pursuant to 8 U.S.C.A. § 1105a(a) (West 1970 & Supp. 1993).

Appendix B

II. DISCUSSION

A. Standard of Review

Resolution of this case depends on application of the proper standard of review for the Board's construction of INA provisions. The Supreme Court clearly set forth the framework for review of an agency's construction of the statute it administers in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As background, the Court stated, " 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' " *Chevron*, 467 U.S. at 843 (omission in original) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). When, as here, Congress has implicitly delegated authority to an agency on a particular question, i.e., where it has left a gap without *expressly* delegating "authority to the agency to elucidate a specific provision of the statute by regulation[,] . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44 (footnotes omitted). Under a well settled principle of deference, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844 (footnote omitted). *See also Udall v. Tallman*, 380 U.S. 1, 16 (1964) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

Thus, "when a court reviews an agency's construction of the

statute it administers, it is confronted with two questions." *Id* at 842.

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id at 842-43 (footnotes omitted). *See also Butros v. INS*, 990 F.2d 1142, 1148-49 (9th Cir. 1993) (en banc) (Trott, J., dissenting).[2]

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2. Under *Chevron*, our review of the BIA's construction of the INA should parallel our review of the National Labor Relations Board's (NLRB) construction of the National Labor Relations Act (NLRA) insofar as each construction is that of an agency construing its own statute. We have stated in the labor context:

> [W]hen reviewing [NLRB] orders the court must address three discrete issues. First, the court determines whether the NLRA provides a clear rule to be applied in the case, and if so, whether the [NLRB] complied with the Act. If no clear rule is provided, the court then determines

(Cont'd)

In sum, "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 488 (1987) (citations omitted), unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *See also Butros*, 990 F.2d at 1149 (Trott, J., dissenting).

B. Applicable Law

Motions to reopen immigration proceedings "are disfavored for the same reasons as are . . . motions for a new trial on the basis of newly discovered evidence." *INS v. Doherty*, 112 S. Ct. 719, 724 (1992). There are three grounds upon which the Board may deny a motion to reopen: (1) failure to establish a *prima facie* case for the relief sought; (2) failure to introduce previously unavailable, material evidence; and (3) a determination that even if these requirements were met, the movant would not be entitled to the discretionary relief sought. *Id* at 725. This case turns on the first ground, where such a *prima facie* showing encompasses a showing of statutory eligibility for relief under section 212(c) of the Act.

Section 212(c) of the Act provides in pertinent part:

(Cont'd)

> whether the NLRA permits the [NLRB] order that is the subject of the appeal. Finally, if the [NLRB] order is permissible, the court must review NLRB precedent to determine whether that order is consistent with such precedent.

NLRB v. New Jersey Bell Tel. Co., 936 F.2d 144, 147-48 (3d Cir. 1991).

Appendix B

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished residence of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section [which provides a list of excludable aliens]. . . .

8 U.S.C.A. § 1182(c). On its face, this statute does not seem to apply to Katsis's case, as the facts here do not involve his leaving the country. Under case law, however, this discretionary relief may be extended to deportable aliens who have not exited the United States. *Tapia-Acuna v. INS*, 640 F.2d 223, 224-25 (9th Cir. 1981); *Francis v INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

The term "lawfully admitted for permanent residence" is defined at section 101(a)(20) of the Act to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.*" 8 U.S.C.A. § 1101(a)(20) (West 1970) (emphasis added). This is the statutory provision the Board has interpreted in order to rule on Katsis's motion to reopen proceedings to obtain discretionary relief under section 212(c).

Katsis fails to identify any express congressional pronouncements on the issue of what will be deemed to trigger a change in an alien's status as a lawful permanent resident under section 101(a)(20) for purposes of section 212(c); independent

inquiry has similarly revealed no congressional guidance in this matter. Whatever the Board's interpretation, then, it cannot be manifestly contrary to the statute. We must therefore proceed to the second question set forth in *Chevron*. Thus, the issue in this case is whether the Board's interpretation of section 101(a)(20) in the context of section 212(c), which deems the status of a lawfully admitted resident alien to have changed upon entry of an administratively final deportation order and which merits substantial deference, is permissible, i.e., not arbitrary or capricious.[3]

C. The Board's Interpretation of Section 101(a)(20)

To determine whether the Board's interpretation of section 101(a)(20) is permissible, we first examine what the Board has done and its reasons for doing so. In determining an alien's statutory eligibility for section 212(c) relief, the Board has considered the interplay between section 212(c) and section 101(a)(20) in the context of two separate issues. The first is a threshold issue of whether the alien has accrued the requisite seven consecutive years of unrelinquished domicile to be statutorily eligible for section 212(c) relief; the second issue is whether, even if the accrual requirement is met, the alien is nonetheless precluded from obtaining section 212(c) relief because the alien's status as a lawful permanent resident changed before he or she filed a motion to reopen proceedings to obtain such relief.

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3. If the Board's interpretation of section 101(a)(20) in the context of section 212(c) is permissible. Then, if requested, we would review its determination of an alien's statutory eligibility under that permissible interpretation for abuse of discretion. *See Doherty*, 112 S. Ct. at 725 (abuse of discretion is proper standard of review when denial of motion to reopen is based on movant's failure to establish a *prima facie* case for the relief sought). Katsis does not raise this issue in his petition for review, however, and therefore it is not before this court.

Appendix B

In *Matter of Lok*, 18 I. & N. Dec. 101 (BIA 1981), *aff'd on other grounds*, 681 F.2d 107 (2d. Cir. 1982), the Board addressed the threshold issue of accrual. Because the accrual period of seven years lawful residence would terminate if and when the alien's status as a lawful permanent resident changed, the Board framed the issue in general terms as follows: "At what point in the deportation proceedings does the status of an alien lawfully admitted for permanent residence come to an end?" *Id* at 105. The Board carefully examined the deportation process and identified four stages "at which the status of an alien 'lawfully admitted for permanent residence' may be considered to have changed within the meaning of Section 101(a)(20) of the Act," *id.*:

> (1) upon the immigration judge's initial determination of deportability, (2) when the immigration judge's order becomes administratively final, (3) when a United States Court of Appeals acts upon a petition for review of the Board's order or the time allowed for filing such petition expires, or (4) only upon the execution of the deportation order by the alien's departure, voluntary or enforced, from this country.

Id.

Before addressing each possibility, the Board noted that the mere occurrence of an act or event providing a basis for deportation is insufficient to change the alien's status as a lawful permanent resident under section 101(a)(20). *Id* at 106. It then determined that termination of such status upon an IJ's initial adjudication of deportability would be premature because the alien has a right to appeal to the Board for *de novo* review of fact and law. *Id.*

The Board declined, however, to adopt the position that an alien present in this country under a final deportation order remains a lawful permanent resident until the order is executed, finding such a proposition inherently incongruous. *Id.; see also Lok v. INS*, 681 F.2d 107, 110 (2d Cir. 1982) (after deportation order becomes final, alien resides in United States "as a matter of grace, not law"). It further concluded that lawful permanent resident status ought not continue through the process of judicial review after the entry of an administratively final deportation order because (1) authority to adjudicate deportability is vested primarily in the Attorney General and his delegates, the IJ and the Board; and (2) judicial review, in contrast to the Board's *de novo* review, is generally limited to ascertaining whether the order is supported by reasonable, substantial, and probative evidence of record. *Lok*, 18 I. & N. Dec. at 107. Additionally, the Board observed that to hold that an alien subject to a final deportation order remains a lawful permanent resident throughout judicial proceedings following the entry of a final deportation order would encourage spurious petitions to the circuit courts for review, filed for the sole purpose of accumulating more time toward section 212(c) eligibility. *Id.*

The Board finally held as follows:

> [T]he policies of the Act would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation generally, when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired.

Id. at 105 (citations omitted). Thus, the Board clearly articulated the principle upon which it decided the case and the reasons why it adopted the principle.[4]

Several years after the Board issued its decision in *Lok*, the Board applied the *Lok* rule to an alien's motion to reopen proceedings to obtain section 212(c) relief in *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987). *Rivera* is therefore analogous to the present case. As in the instant case, the alien, who had once been admitted to the United States as a lawful permanent resident, did not move to reopen deportation proceedings to obtain discretionary relief under section 212(c) until he was already subject to an administratively final deportation order. The Board deemed the alien's status as a lawful permanent resident of this country changed by the administratively final deportation order, which resulted in the alien's statutory ineligibility for section 212(c) relief and the consequent denial of his motion.

On petition for review, the Court of Appeals for the Fifth Circuit initially failed to accord deference to the Board's interpretation; it therefore rejected the Board's reliance on *Lok* and remanded the case. *Rivera v. INS*, 791 F.2d 1202, 1206-07 (5th Cir. 1986), *vacated on reconsideration*, 810 F.2d 540 (5th Cir. 1987). On reconsideration, however, the court reversed itself, stating, "[W]e are persuaded that the Board's interpretation of the [INA] is not unreasonable; given the 'great deference' we must accord the [Board's] interpretation of that Act, we accept its interpretation and affirm its order." *Rivera v. INS*, 810 F.2d 540, 540 (5th Cir. 1987). The court specifically noted that "[t]he [Board's] *Lok* opinion,

4. Further the Board specifically addressed prior decisions suggesting a contrary holding by distinguishing them because they did not present the same issue for determination and by declaring them superseded to the extent any conflict may exist. *Id.* at 106-07.

which the Board carefully followed in the instant case, reflects careful consideration of the solution to the problem of when lawful residence in this country should terminate. We find nothing unreasonable about the BIA's rationale or its conclusion." *Rivera*, 810 F.2d at 541. The court concluded that the BIA's interpretation was not only fair, but conserves the resources of an already beleaguered Board" and "prevents the alien from stringing out his claims and delaying the ultimate disposition of his case." *Id.*

In at least seven subsequent cases, the Board has consistently applied the *Lok* rule to motions to reopen proceedings to obtain section 212(c) relief.[5] In the first case not reviewed by the Court of Appeals for the Fifth Circuit, *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990), *overruled by Butros*, 990 F.2d 1142 (9th Cir. 1993), the Court of Appeals for the Ninth Circuit upheld the Board's denial, based on *Lok* of an alien's motion to reopen that was filed after the alien became subject to an administratively final deportation order. In the second case, *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991), the court rejected the Board's application of the *Lok* rule to motions to reopen. In the third case, *Matter of Cerna*, Int. Dec. 3161, A-30257519, 1991 WL 353528 (BIA Oct. 7, 1991), the Board cited *Lok*, *Rivera*, and *Gonzales* in denying an alien's motion to reopen and the alien sought no judicial review of that denial. In the fourth case, *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (en banc), the Court of Appeals for the Ninth Circuit revisited and rejected the application of *Lok* to motions to reopen, thereby overruling

---

5. In three of these cases, the Court of Appeals for the Fifth Circuit, citing its decision in *Rivera*, affirmed the Board's application of the *Lok* rule to motions to reopen to obtain section 212(c) relief *Prichard-Ciriza v. INS*, 978 F.2d 219, 222-23 (5th Cir. 1992); *Ghassan v. INS*, 972 F.2d 637-38 (5th Cir. 1992), *cert denied*, 113 S. Ct. 1412 (1993); *Garcia Hernandez v. INS*, 821 F.2d 222, 224 (5th Cir. 1987). In each of these cases, the Board's application of the *Lok* rule resulted in the denial of the alien's motion for the same reasons the motion was denied in the present case.

Gonzales. We specifically note, however, that in both *Vargas* and *Butros* the courts failed to review the Board's interpretation of its own statute under the deferential standard that the Supreme Court articulated so clearly in *Chevron.*

Under *Chevron,* the court cannot substitute its preferred interpretation of section 101(a)(20) with the Board's if the Board's is permissible, i.e., not arbitrary or capricious. *Chevron,* 467 U.S. at 843-44 & n.11. If for no other reason than ease of application, it is reasonable to attempt to establish one single standard for the time an alien's lawful permanent resident status changes for all purposes under section 212(c). *See Cerna,* 1991 WL 353528, at *15 ("Our interpretation of the law [under *Lok*] established a rather straightforward test in an area of the law which is particularly contorted").

Furthermore, the standard itself is reasonable. As applied in the present case, it fairly gave Katsis an additional 10 months to discover any material evidence not available at the time the IJ originally found he was deportable and denied his application for a section 212(c) waiver. Keeping in mind that motions to reopen are disfavored, *Doherty,* 112 S. Ct. at 724, the Board's interpretation establishes a clear cut-off date that in effect operates like a statute of limitations to set the last day upon which an alien can establish statutory eligibility for section 212(c) relief on a motion to reopen proceedings.

This unambiguous cut-off date discourages unnecessary and prolonged litigation by its very clarity, promotes finality, and avoids adjudication of state claims as all statutes of limitations do. It also allows the Board, on *de novo* appeal from an IJ's decision to deny an alien a section 212(c) waiver, to examine all the evidence relevant to a grant of discretionary relief under section 21 2(c) at

one time, rather than in two separate proceedings. In a like manner, it operates to limit the circuit courts' exposure to multiple petitions for review, as we have had in this very case.

Moreover, it sets the last day through which an alien can manipulate deportation proceedings by his or her after-the-fact manufacture of additional evidence of equities to balance the adverse factor or factors he or she must overcome to receive discretionary relief under section 21 2(c).[6] Under the Board's

6. Section 3.2 of the regulations. entitled "Reopening or reconsideration," provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing *unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.*

8 C.F.R. § 3.2 (emphasis added). Katsis points to the emphasized language to show that motions to reopen are specifically intended to take into account after-the-fact evidence. We disagree. Motions to reopen are specifically intended to take into account material evidence that was not available and therefore could not have been presented at the former hearing. The emphasized language comes into play under the indicated circumstances to *restrict* the evidence that may be presented on a motion to reopen if an alien failed to apply for discretionary relief during earlier proceedings. In this context, although the restriction acknowledges that evidence manufactured after the fact may be used to support a motion to reopen, it is hardly a rousing encouragement for or approval of such tactics.

precedent in *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978), "the adverse factors evidencing an alien's undesirability as a permanent resident" must be weighed against "the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interest of this country." *Marin*, 16 I. & N. Dec. at 584. These social and humane considerations, or equities, are measured by examining evidence considered favorable to the exercise of section 212(c) discretion.

Some of these favorable considerations, by their very nature, cannot be created or materially augmented after a final deportation order has been entered. For example, an alien who entered the United States as an adult cannot alter history to gain the additional equity that would accompany entry as a young child. *Id.* at 584-85. Other favorable considerations, however, can, on the alien's own initiative or following advice of counsel, be systematically manufactured or significantly augmented during whatever time an alien manages to remain in this country through diligent efforts to keep alive immigration proceedings regarding his or her deportation. These considerations include:

> [F]amily ties within the United States, . . . evidence of hardship to the [alien] and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to [an alien's] good character (e.g., affidavits from family, friends, and responsible community representatives).

Id. Marin is, in effect, a blueprint for crafting a set of circumstances to overcome adverse factors in an discretionary determination under section 212(c).

An alien's continuing ability to manufacture such evidence, whether legitimate or not, and the consequent incentive to file spurious petitions for review in the circuit court to extend the time for such manufacture, is a legitimate concern addressed by application of the *Lok* rule.[7] Surely an alien subject to an administratively final deportation order cannot be heard to complain that he or she is in any way prejudiced by the Board's refusal to consider activities engaged in after that order became final. At that point the alien is clearly on notice that he or she may soon be departing this country.

In summary, the Board's interpretation establishes a standard that provides an alien with a fair amount of time to uncover legitimate evidence that was unavailable when the IJ originally denied a requested section 212(c) waiver. This standard at the same time reduces the incentive for an alien to string out his or her claims to avoid the ultimate disposition of the case, "where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Doherty*, 112 S. Ct. at 724-25. As a consequence, the Board's standard (1)

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7. The *Vargas* court rejected the application of *Lok* to motions to reopen in part because it concluded that "[t]he concern which motivated the creation of the rule in *Matter of Lok* — preventing an alien from manipulating deportability proceedings so as to acquire seven years of domicile — is not present here." *Vargas*, 938 F.2d at 361. We conclude, however that insofar as application of the *Lok* rule prevents an alien from manipulating deportation proceedings so as to acquire or enhance his or her equities under section 212(c) in an after-the-fact manner the concern which motivated the creation of the *Lok* rule also supports its application to motions to reopen as a " 'product of reasoned decision-making.' " *Id.* (citations omitted).

discourages unnecessary litigation and promotes finality; (2) reduces both Board and circuit court exposure to multiple, piecemeal requests for consideration of one kind or another; and (3) reduces the incentive to file meritless petitions for review in the circuit courts, which lessens the burdens on those courts, just to buy the alien more time to create after-the-fact evidence of equities. For all these reasons, the Board's interpretation of section 101(a)(20) in the context of section 212(c) relief is reasonable, and not arbitrary or capricious, and therefore it is a permissible interpretation of the statute. *Butros*, 990 F.2d at 1150; *Rivera*, 810 F.2d at 541.

Katsis asserts that the Board's interpretation is internally inconsistent because the standard it establishes renders him ineligible to file a motion to reopen, but not one to reconsider. The INS contends that the difference is logical given the goals each motion sets out to accomplish. We note that motions to reopen and motions to reconsider are the creations of regulation and not statute. *See Doherty*, 112 S. Ct. at 724. Nonetheless, "deference is required whether an agency is interpreting the statute directly . . . or through a rule or regulation promulgated thereunder. *ALM Corp. v. United States EPA, Region II*, 974 F.2d 380, 383 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1412 (1993). Therefore, on review we defer to an agency's construction of its own regulation, 'unless it is plainly erroneous or inconsistent with the regulation.' " Beazer *E., Inc. v. United States EPA, Region III*, 963 F.2d 603, 606 (3d Cir. 1992).[8]

A motion for reconsideration looks for error in the proceedings based on the factual record as it stands and is successful only if a defect is found in the original decision. If error

8. Katsis does not dispute the INS's interpretation of the INA to allow motions to reopen and to reconsider.

is found in a Board determination that an alien is deportable and undeserving of section 212(c) relief, reversal nullifies the finality of the deportation order and the consequent status change as well. Given that the deportation order cannot stand where such an error has been made, there is no reason to allow the deportation order to preclude a motion for reconsideration.

On the other hand, an alien is required to introduce new evidence in order to move to reopen proceedings, which introduction generally requires a new hearing and creates a different factual record on which to base either a redetermination of deportability or eligibility for section 212(c) relief or both. The policy concerns in favor of finality loom much larger in this context than in the context of a motion to reconsider because no error is asserted. Absent some sort of obstruction by the INS of an alien's ability to collect evidence not alleged here, the Board should be permitted to determine essentially this: if it takes longer than the period between the IJ's determination of deportability and ineligibility for section 212(c) relief and the Board's affirmance of that determination for an alien to find (or create) new evidence, either (1) the alien has not been sufficiently diligent in his efforts, (2) the probabilities do not favor the existence of material evidence unavailable at the time of the IJ's decision, (3) any such evidence that may exist is stale, or (4) the alien should be given no more time to create evidence after the fact. We find nothing inconsistent in the Board's approach to these two types of motions, and its decision to distinguish between the two is reasonable.

Finally, Katsis suggests that the Board's reading of the statutes in question contradicts the right to reopen granted by 8 C.F.R. § 3.2. The regulation, however, cannot provide a right broader than that which is provided by a necessarily implicated statute. Section 212(c) contains pertinent language limiting its application

to aliens "lawfully admitted for permanent residence." Section 101(a)(20) defines that term to exclude aliens who once were lawfully admitted for permanent residence but whose status has since changed. Congress left it to the Attorney General to interpret that language, and the Board, as the delegate of the Attorney General, has done so in a permissible fashion. The Board's permissible interpretation articulates the contours of the section 212(c) restriction pertinent here, and those contours cannot be said to contradict the INS regulations that create and govern motions to reopen. Rather, the regulations must be read, if possible, to conform to statutory mandates, and the Board has done so here. Therefore, its interpretation of its own regulations is not clearly erroneous or inconsistent with those regulations.

III. CONCLUSION

The Board interprets section 101(a)(20) in the context of section 212(c) relief to mean that an alien's status as a lawful permanent resident changes when he or she becomes subject to an administratively final deportation order. This interpretation in the specific context of motions to reopen proceedings to obtain section 212(c) discretionary relief from deportation results in an alien's statutory ineligibility for such relief if the motion is filed after the alien becomes subject to such a final deportation order. This interpretation is a reasonable and, thus, a permissible construction of the statute. Because it is a permissible construction of the statute, this court will not disturb it.

Application of the Board's interpretation of section 101(a)(20) in the instant case results in a determination that Katsis was statutorily ineligible for discretionary relief under section 212(c) at the time he filed his motion to reopen proceedings to obtain such relief because he was then subject to an administratively final

deportation order. Therefore, he was no longer a lawful permanent resident as is expressly required by section 212(c).

Accordingly, the Board's denial as a matter of law of Katsis's motion to reopen proceedings to obtain section 212(c) relief is consistent with its interpretation of the INA and will be affirmed. The petition for review will therefore be denied.

Each side to bear its own costs.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — DECISION AND ORDER OF THE BOARD OF IMMIGRATION APPEALS DENYING PETITIONER'S MOTION TO REOPEN DATED SEPTEMBER 16, 1992

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A37 588 636 - Philadelphia Date: SEP 16 1992

In re: STAVROS *KATSIS*

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

James J. Orlow, Esquire
Orlow and Orlow, P.C.
Sixth and Chestnut Streets
1154 Public Ledger Building
Philadelphia, Pennsylvania 19106

ON BEHALF OF SERVICE:

Richard J. Sharkey
District Counsel

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Reopening

Appendix C

In a decision dated November 6, 1990, an immigration judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordered him deported from the United States to Germany or Greece. The Board dismissed the respondent's appeal from this decision on September 3, 1991. On August 19, 1992, the respondent filed a motion to reopen. The motion will be denied.

A motion to reopen must, among other things, state the new facts to be considered at the reopened hearing and must be supported by previously unavailable, material evidence. *See* 8 C.F.R. § 3.2. The alien also must establish prima facie eligibility for the relief sought before a motion to reopen will be granted. *INS v. Doherty*, __ U.S. __, 112 S. Ct. 719 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam); *Matter of Ruiz*, Interim Decision 3116 (BIA 1989). The Board has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief. *INS v. Doherty, supra.* Moreover, a party who seeks to reopen proceedings bears a "heavy burden" of proving that if the proceedings before the immigration judge were reopened, the new evidence would likely change the result in the case. *Matter of Coelho*, Interim Decision 3172 (BIA 1992); *see INS v. Doherty, supra; INS v. Abudu, supra.*

An applicant for relief under section 212(c) of the Act must be a lawful permanent resident of the United States and must have a lawful unrelinquished domicile of 7 consecutive years. *See* section 212(c) of the Act; *Gonzalez v. INS*, 921 F.2d 236, 238 (9th Cir. 1990). A respondent who is subject to an administratively final order of deportation cannot successfully move to reopen deportation proceedings to apply for relief under section 212(c) of the Act as such a respondent is no longer a lawful permanent

resident of this country. *Matter of Cerna,* Interim Decision 3161 (BIA 1991). In the present case, the respondent is no longer a lawful permanent resident of this country as his status as such ended upon the Board's dismissal of his appeal. The September 3, 1991, decision of the Board provided a final administrative order of deportation. *See* section 101(a)(20) of the Act, 8 U.S.C. 1101(a)(20) (1988); *Rivera v. INS,* 810 F.2d 540 (5th Cir. 1987); *Matter of Lok,* 18 I&N Dec. 101 (BIA 1981), *aff'd on other grounds, Lok v. INS,* 681 F.2d 107 (2d Cir. 1982); *see also* 8 C.F.R. §§ 3.37, 242.20, 243.1 (1992).

On appeal, the respondent suggests that the Board's decision in *Matter of Cerna, supra,* should be reconsidered. He notes that motions are discretionary determinations (*See* 8 C.F.R. §§ 3.2 and 3.8), and argues that the Board's policy, which precludes a motion to reopen in section 212(c) cases as a matter of law, fails to even consider the discretionary factors. The respondent suggests that the Board lacks regulatory authority to make such a discretionary distinction absent an express change in the regulations. Finally, he maintains that because he has already demonstrated prima facie eligibility in the underlying proceedings, adjudication of the motion should focus solely on discretionary aspect of that relief.

We find the respondent's arguments to be unpersuasive. The regulatory provisions cited by the respondent at 8 C.F.R. § 3.2 and 3.8, provide for the denial of a motion in the absence of previously unavailable material evidence. Nevertheless in addition to this regulatory power to deny the motion, the Supreme Court has held that the Board also may deny a motion either based either on a failure to demonstrate prima facie eligibility for the relief sought or as a matter of discretion. *INS v. Doherty, supra* at 725. We therefore find no support for the respondent's assertion that the Board must enter into a discretionary determination in adjudicating a motion to

reopen. In addition, there is no authority to support the respondent's assertion that his ability to demonstrate prima facie eligibility in the underlying proceeding guarantees his continued eligibility when seeking to reopen the proceedings.

For the reasons we enunciated in *Matter of Cerna, supra,* and *Matter of Lok, supra,* barring a reversal on the merits of the respondent's deportability finding by an appellate court or administratively,[1] the respondent lost his status as a lawful permanent resident on September 3, 1991, upon the entry of a final Board decision. Thus, he is no longer statutorily eligible for relief under section 212(c). *Matter of Cerna, supra; Gonzalez v. INS, supra.*

We note that the respondent's motion contains new evidence that would serve to bolster his equities for a discretionary determination under section 212(c) of the Act. Nevertheless, considering his statutory ineligibility for relief, we find it unnecessary to review this evidence.

Accordingly, the following order will be entered.

ORDER: The motion is denied.

s/ Mary Maguire Dunne
FOR THE BOARD

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1. The respondent apparently sought review of the Board's order by filing a Petition for Review in the United States Court of Appeals for the Third Circuit. However, the court upheld the Board's decision (Respondent's brief at 2).

APPENDIX D — PER CURIAM OPINION AND ORDER OF THE ELEVENTH CIRCUIT AFFIRMING THE ORDER OF THE BOARD OF IMMIGRATION APPEALS IN *CERNA v. INS* FILED NOVEMBER 9, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 91-5054 & 5945

INS No. A30-257-519

MARIO CERNA,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

(November 9, 1992)

Before FAY and EDMONDSON, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

Because we cannot say the Board either failed to exercise its discretion or abused its discretion in ordering Cerna's deportation or in denying Cerna's motion to reopen and to reconsider, the Board's orders are AFFIRMED.

No. 93-423

In the Supreme Court of the United States

OCTOBER TERM, 1993

STAVROS KATSIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

CHARLES E. PAZAR
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an individual who has been found deportable by a final order of the Board of Immigration Appeals remains eligible to file a motion to reopen deportation proceedings to seek relief from deportation under 8 U.S.C. 1182(c), even though that relief is available only to permanent resident aliens and an individual found deportable is no longer a permanent resident alien.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-423

STAVROS KATSIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-23a) is reported at 997 F.2d 1067. The opinion of the Board of Immigration Appeals (Pet. App. 24a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. A petition for rehearing was denied on August 9, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Greece who was admitted to this country as a lawful permanent resident in 1983. In 1988, he was convicted of a controlled substance offense, for which he served a prison term of about two years. The Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner in January 1989, contending that the conviction rendered him deportable under 8 U.S.C. 1251(a)(11) (1988).[1] At his deportation hearing, petitioner conceded that he was deportable, but sought discretionary relief from deportation under 8 U.S.C. 1182(c).[2] The immigration judge concluded that petitioner was deportable and that he was eligible for relief under Section 1182(c),[3] but

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[1] The grounds for deportation were reorganized by Section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077, and the provision cited in the text now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. IV 1992). The amendment does not apply to this case because the 1990 Act states that the amendments set forth in Section 602 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." § 602(d), 104 Stat. 5082.

[2] That provision was amended by Section 307(b) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1754, but the revisions have no effect on this case. For convenience, references to 8 U.S.C. 1182(c) are to the currently codified version of the provision.

[3] Although the statute on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See, *e.g.*, *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (BIA 1976); see also *id.* at 32 (Appleman, concurring)

declined to grant relief because of the seriousness of petitioner's offense. Petitioner appealed to the Board of Immigration Appeals, challenging the denial of relief under Section 1182(c), but the Board affirmed. The court of appeals denied a petition for review in an unpublished opinion dated July 17, 1992. See Pet. App. 5a-6a; *Katsis* v. *INS*, 972 F.2d 1331 (3d Cir. 1992) (Table).

2. On August 17, 1992, after the court of appeals denied his petition for review of the order of deportation, petitioner filed a motion to reopen his deportation proceedings before the Board. The Board denied the motion. Pet. App. 24a-27a. It explained that an alien seeking reopening must show his prima facie eligibility for the relief sought, and that relief under Section 1182(c) is limited to lawful permanent residents. Pet. App. 25a. Relying on its decision in *In re Cerna*, Interim Dec. No. 3161 (BIA Oct. 7, 1991), aff'd, *Cerna* v. *INS*, 979 F.2d 212, 213 (11th Cir. 1992) (Table) (per curiam), the Board reasoned that petitioner was not a permanent resident at the time he filed the motion to reopen because the Board's earlier decision had resulted in an administratively final order of deportation that deprived him of permanent resident status. Pet. App. 25a-26a.

3. The court of appeals denied petitioner's petition for review of the Board's denial of his motion to reopen. Pet. App. 3a-23a. The court noted its obligation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the Attorney General's construction of the relevant provisions of the Immigration and Nationality Act (Pet. App. 7a), and then conducted an extensive analysis of the reasonableness of the Board's interpretation (*id.* at 11a-20a). The

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(noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

court concluded that the Board's interpretation is "reasonable, and not arbitrary or capricious," because it

> (1) discourages unnecessary litigation and promotes finality; (2) reduces both Board and circuit court exposure to multiple, piecemeal requests for consideration of one kind or another; and (3) reduces the incentive to file meritless petitions for review in the circuit courts, which lessens the burdens on those courts.

Id. at 19a-20a.

ARGUMENT

1. Petitioner argues (Pet. 4-10) that the Board erred in denying his motion to reopen his deportation proceedings on the ground that he was ineligible for the relief he sought at the time he filed the motion to reopen. As this Court has explained, an alien seeking to reopen deportation proceedings must, *inter alia*, make a prima facie showing that he is eligible for the relief he seeks. *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). To be eligible for relief under 8 U.S.C. 1182(c), an alien must, among other things, be a lawful permanent resident alien. Under 8 U.S.C. 1101(a)(20), an alien is "lawfully admitted for permanent residence" if he has "the status of having been lawfully accorded the privilege of residing permanently in the United States * * *, such status not having changed."

Hence, the principal question in this case is whether petitioner's status as a lawful permanent resident alien "changed," for purposes of 8 U.S.C. 1101(a)(20), at the time the Board issued a final order of deportation. In light of the statutory mandate that deportation decisions "shall be final" upon completion of administrative proceedings, see 8 U.S.C. 1252(b) (1988 & Supp. IV 1992);

8 C.F.R. 243.1 ("an order of deportation * * * shall become final upon dismissal of an appeal by the Board"), the Board consistently has held that a permanent resident alien's status changes at that time and that the alien is not thereafter eligible to seek relief that is dependent on permanent resident status. See *In re Cerna*, Interim Dec. No. 3161 (BIA Oct. 7, 1991), aff'd, *Cerna* v. *INS*, 979 F.2d 212, 213 (11th Cir. 1992); see also *Gonzales* v. *INS*, 921 F.2d 236, 238-239 (9th Cir. 1990) (similar analysis before *Cerna*).

The further question presented by this case is, if a permanent resident alien's status is "changed" upon entry of a final order of deportation, whether a motion to reopen is a proper vehicle for reversing that change of status. Because a motion to reopen is, in the Board's view, a request for a new decision based on evidence or arguments not before the original tribunal, the Board has concluded that aliens as to whom it has issued a final order of deportation should not be able to reopen their deportation proceedings to secure relief from deportation based on Section 1182(c). *Cerna*, slip op. 6.[4]

2. Petitioner correctly notes (Pet. 5-6; Pet. Supp. Br. 1-5) that the courts of appeals have reached conflicting results on the question presented by the petition. Like the Third Circuit in this case, the courts of appeals for the Fourth, Fifth, and Eleventh Circuits accept the analysis set forth by the Board in *Cerna*. *Nwolise* v. *INS*, 4 F.3d 306, 310-312 (4th Cir. 1993), petition for cert.

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[4] As the Board concluded in *Cerna*, that rule does permit aliens to file motions to *reconsider* the original decision, because such a motion does not seek a new decision based on new evidence, but instead seeks to convince the tribunal that it erred in resolving the matters placed before it when it originally ruled. See *Cerna*, slip op. 5-6.

pending, No. 93-6427; *Ghassan* v. *INS*, 972 F.2d 631 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993); *Rivera* v. *INS*, 810 F.2d 540 (5th Cir. 1987); *Jaramillo* v. *INS*, 1 F.3d 1149, 1152-1156 (11th Cir. 1993) (en banc). On the other hand, the Board's analysis has been rejected by the courts of appeals for the First, Seventh, and Ninth Circuits.[5] *Goncalves* v. *INS*, 6 F.3d 830, 832-835 (1st Cir. 1993); *Henry* v. *INS*, No. 91-2252 (7th Cir. Oct. 15, 1993), slip op. 13-23; *Butros* v. *INS*, 990 F.2d 1142, 1144-1146 (9th Cir. 1993) (en banc).[6]

Notwithstanding the conflict in the appellate decisions, we do not believe that the question merits review by the Court at this time. As we explained in our brief in opposition to the certiorari petition in *Ghassan* v. *INS*, cert. denied, 113 S. Ct. 1412 (1993) (No. 92-872),[7] Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066, directed the Attorney General to promulgate regulations that would delineate more precisely the circumstances under which motions to reopen would be permissible.[8] After extensive internal deliberations, those regulations now have been prepared

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[5] The Second Circuit also has reached a contrary result, *Vargas* v. *INS*, 938 F.2d 358, 360-364 (1991), but that decision (issued before the Board's opinion in *Cerna*) rested on the lack of serious administrative consideration of the question at that time, see *id.* at 361-363. Accordingly, it is not clear that the Second Circuit would adhere to *Vargas* in light of the Board's detailed consideration of the question in *Cerna*.

[6] The decision in *Butros* expressly repudiated the court's earlier decision in *Gonzales* v. *INS*, 921 F.2d 236, 238-239 (9th Cir. 1990). *Butros*, 990 F.2d at 1145.

[7] We have provided counsel for petitioner with a copy of our brief in *Ghassan*.

[8] The Immigration Act of 1990 required issuance of those regulations by the spring of 1991. § 545(d), 104 Stat. 5066.

and are in the final stages of review at the highest levels of the Justice Department. We have been informed that the regulations are expected to be issued in the near future and that they will specifically address the question presented by the certiorari petition in this case.

The forthcoming regulations render review by the Court unnecessary. Each of the courts of appeals that has rejected the government's position has relied heavily on the notion that the analysis of the Board in *Cerna*—that aliens seeking relief under Section 1182(c) cannot file motions to reopen—is inconsistent with the unqualified provision in 8 C.F.R. 3.2 authorizing motions to reopen. See *Goncalves* v. *INS*, 6 F.3d 830, 832-833 (1st Cir. 1993); *Henry* v. *INS*, No. 91-2252 (7th Cir. Oct. 15, 1993), slip op. 21-22; *Butros* v. *INS*, 990 F.2d 1142, 1145 (9th Cir. 1993) (en banc). Accordingly, the forthcoming regulations of the Attorney General expressly addressing the subject of motions to reopen in order to seek discretionary relief under Section 1182(c) will eliminate any basis for future appellate rulings that the Board's disposition of such motions to reopen is inconsistent with the governing regulations. The regulations also will render the current circuit conflict concerning the interpretation of the soon-to-be-superseded regulations of no continuing importance.

In light of these developments, the Solicitor General has decided not to file petitions for a writ of certiorari to review the decisions of the First and Seventh Circuits in *Goncalves* and *Henry* that rejected the Board's position under the existing regulations.[9] Indeed, the First Cir-

[9] The Solicitor General likewise declined to file a petition for a writ of certiorari last summer seeking review of the Ninth Circuit's decision in *Butros*, in light of the prospect (which now is

cuit specifically suggested that the problem be resolved by amending the regulations, in lieu of seeking review in this Court. See *Goncalves*, 6 F.3d at 835-836. Consistent with that approach—and with the Court's denial of certiorari in *Ghassan*—the petition for a writ of certiorari in this case should be denied.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

CHARLES E. PAZAR
Attorney

DECEMBER 1993

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soon to be realized) that the statutorily mandated revision of the reopening regulations specifically would address the question presented here).

[10] We also are filing today a brief in opposition to the petition in *Nwolise* v. *INS*, No. 93-6427, which seeks review of the Fourth Circuit's decision sustaining the Board's approach under the current regulations.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993
No. 93-423

STAVROS KATSIS, Petitioner

v

UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE, Respondent

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.7, Petitioner submits this Brief to invite the Court's attention to five new decisions of the Courts of Appeals: Henry v. INS, Nos. 91-2252, 92-1476, and 92-2801 (7th Cir. October 15, 1993); Goncalves v. INS, ____ F.3d ____, No. 92-1122, 92-2272, 1973 U.S. App. LEXIS 2476 (1st Cir. September 28, 1993) Jaramillo v. INS, 1 F.3d 1149, No. 92-4332 (11th Cir., September 14, 1993)(en banc); Nwolise v. INS, No. 91-1173 (4th Cir. September 3, 1993) (Petition for Writ of Certiorari No. 93-6427, filed October 20, 1993), and Perez-Rodriguez v. INS, No. 92-3081 (7th Cir. August 25, 1993). Copies of these decisions are attached.

At issue is the availability of relief under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), on a motion to reopen deportation proceedings, following the issuance of an order of deportation by the Board of Immigration Appeals ("Board"). Section 212(c) provides the only relief available to aliens who, having been lawful permanent residents of the United States for seven or more years, face deportation for certain serious crimes.

The first of the questions presented in our Petition for Writ of Certiorari is:

> 1. Whether an applicant for relief from deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), is barred, as a question of law, from administrative reopening for consideration of material new evidence, an issue on which the courts of appeals are in direct conflict.

As the principal Reason for Granting the Writ, Petitioner cited and discussed the following cases evidencing this conflict from the Ninth, Second, Seventh, and Fifth Circuits: Butros v. INS, 990 F.2d 1142 (9th Cir. 1993)(en banc); Vargas v. INS, 938 F.2d 358 (2d Cir. 1991); Variamparambil v. INS, 831 F.2d 1352 (7th Cir. 1987); Rivera v. INS, 810 F.2d 540 (5th Cir. 1987).

In the interim, three additional Circuits have ruled. Each has gone a different way. The decisions in Jaramillo, Goncalves, and Nwolise, in the Eleventh, First, and Fourth Circuits, all decided in September 1993, demonstrate even further the sharp conflict between the Circuits in the application of Section 212(c) as a remedy in deportation proceedings.

In addition, since the filing of this Petition, the Seventh Circuit has developed a sharp internal split. A panel of the Seventh Circuit has narrowed the scope of Variamparambil so as to

permit reopening of the Board's order for purposes of 212(c) relief. Henry, supra. The Henry panel, in a 26-page opinion, carefully analyzed the Board's position in Matter of Cerna, Int. Dec. 3161, 1991 WL 353528 (BIA October 7, 1991) and those circuits which have followed or rejected Cerna. The Court held that a motion to reopen for admission of new evidence under Section 212(c) remains available following the issuance of an order of deportation by the Board, distinguishing the question of whether the Board's deportation order tolls accrual of time towards the requirement that the alien establish "lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. § 1182(c). The decision in Henry splits the Seventh Circuit against itself on this issue, another panel having reached the opposite conclusion in Perez-Rodriguez v. INS, No. 92-3081 (August 25, 1993).

The First, Second, Seventh and Ninth Circuits now hold that the Board's order of deportation, which can be reopened generally, can also be reopened for purposes of considering new evidence relevant to a determination under §212(c). By contrast, an alien whom the Board has found deportable is barred from §212(c) as a matter of law in the Third, Fourth, Fifth, and Eleventh Circuits, and another panel of the Seventh Circuit.

The importance of this issue, and the discord and confusion among the Courts of Appeal, are demonstrated by the contradictory opinions issued by the Courts of Appeal so far in this calendar year: Henry, supra; Perez-Rodriguez v. INS, supra; Jaramillo,

supra; Goncalves, supra; Nwolise, supra, and Katsis v. INS, the subject of the instant petition. It is further demonstrated by the actions of the Seventh, Ninth, and Eleventh Circuits which during this year have reversed or distinguished their previous decisions to expand the rights of aliens.

In Henry, the Seventh Circuit distinguished Variamparambil to open 212(c) relief to aliens whom the Board has found deportable. The Henry panel cited but did not attempt to distinguish Perez-Rodriguez, supra, which held Variamparambil applicable and reached the opposite result.

In Butros v. INS, 990 F.2d 1142 (9th Cir. 1993), the Court sitting en banc reversed its prior decision in Gonzales v. INS, 921 F.2d 236 (9th Cir. 1990), on which the Board had relied. The Ninth Circuit switched sides in this conflict, holding that 212(c) relief was available to the alien on a motion to reopen the Board's deportation order. Dissenting, Judge Trott lamented the conflict among the circuits and expressed his hope that this Court would review this issue to provide a federal interpretation of §212(c) upon which the Board could rely. In Jaramillo v. INS, supra, the Eleventh Circuit reversed its decision in Marti-Xiques v. INS, 741 F.2d 350 (11th Cir. 1984), to hold that 212(c) relief was available to the alien during the period from issuance of an Order to Show Cause by the INS, until an administratively final order of deportation is entered by the Board.

Judge Trott's lament, which echoed the Board's own expression of distress in Matter of Cerna, Int. Dec. 3161, 1991 WL 353528 (BIA October 7, 1991), is all the more appropriate today, as in the course of three months (August through October 1993) five Circuits have examined §212(c) and come to conclusions at odds with one another and/or with their own prior decisions.

This issue is important: for uniformity of law, for implementation of a remedy which Congress granted by statute, and above all for the lives of aliens seeking relief, and their families. Deportation is a harsh penalty for one who has lived in the United States for many years (a signal prerequisite for §212(c) applicants). It also visits hardship on the aliens' families, who are frequently divided. In Petitioner's case, his U.S. citizen

wife, son, and stepdaughter will be deprived of husband, father, and sole breadwinner. Eligibility for relief from deportation should not depend on geographic location.

WHEREFORE, Petitioner respectfully requests that this Court grant Certiorari and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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November 11, 1993

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 91-2252, 92-1476 & 92-2801

ELSTON A. HENRY,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of Final Orders
of the Board of Immigration Appeals
No. A35-185-743

No. 92-3104

NIKOLA AKRAP,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of a Final Order
of the Board of Immigration Appeals
No. A31-043-218

ARGUED APRIL 27, 1993—DECIDED OCTOBER 15, 1993

Before FLAUM, RIPPLE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Two of the four petitions for review before us today present a common question of law—whether Elston Henry and Nikola Akrap, both of whom are subject to final administrative orders of deportation resulting from narcotics convictions, may seek to reopen their previously-denied applications for a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), to present evidence of changed circumstances. The Board of Immigration Appeals (the "Board" or "BIA") said no as a matter of law because an alien can no longer satisfy section 212(c)'s lawful permanent residency requirement after a final order of deportation has been entered. The circuits have disagreed in reviewing this interpretation of the statute, and we align ourselves today with those that have rejected it. We accordingly grant two of the petitions for review and remand each case to the Board for further proceedings.

I. BACKGROUND

A. Elston A. Henry

Henry is a native and citizen of Antigua, West Indies who was admitted into the United States as a lawful permanent resident on August 6, 1976. Almost ten years later, on April 21, 1986, Henry was convicted by a jury of distributing less than ten grams of a substance containing cocaine, a felony under Illinois law. He was sentenced to a short period of work release and four years probation. The judge also imposed a fine and required Henry to resume paying child support.[1] Henry subsequently was charged with possessing with the intent to deliver between one and fifteen grams of cocaine, a violation of his pro-

[1] Henry has a daughter and a son, both of whom are United States citizens. He previously had been paying child support for his daughter.

bation. The judge therefore revoked Henry's probation and sentenced him to five years in prison.[2]

Before Henry's probation was revoked, however, the Immigration and Naturalization Service ("INS") had commenced deportation proceedings pursuant to INA section 241(a)(11), 8 U.S.C. § 1251(a)(11), because of his conviction for a drug offense.[3] Henry conceded deportability but moved for a discretionary waiver of deportation pursuant to section 212(c), 8 U.S.C. § 1182(c).[4] The Immigration Judge ("IJ") denied the application, and the Board dismissed Henry's subsequent appeal in an opinion dated December 7, 1990. The Board concluded that Henry had failed to show the unusual or outstanding equities required for section 212(c) relief from a deportation order based on a serious drug

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[2] The probation violation suggested that the earlier cocaine conviction had not stemmed from an isolated incident. In fact, Henry testified before the Immigration Judge that he had used cocaine "a few times," and when immigration officers took him into custody in December 1986, they found a vial of cocaine in his possession.

[3] Although section 241(a)(11) has been amended by the Immigration Act of 1990, the amendments do not apply to deportation proceedings commenced before March 1, 1991. *Castaneda-Suarez v. INS*, 993 F.2d 142, 143 n.1 (7th Cir. 1993). Deportability based upon the commission of a criminal offense is now addressed in section 241(a)(2), 8 U.S.C. § 1251(a)(2).

[4] Section 212(c) provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

8 U.S.C. § 1182(c). Although section 212(c) literally refers only to the excludability of aliens seeking readmission to the United States, it has been interpreted to also apply "to lawful permanent residents who have not left the United States but [who] meet the seven-year requirement and face deportation." *Cortes-Castillo v. INS*, 997 F.2d 1199, 1202 (7th Cir. 1993); *see also Castaneda-Suarez*, 993 F.2d at 143 n.2; *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976).

offense. The Board noted that Henry had not lived in the United States for long, that he did not have a close relationship with his two children, that he was substantially in arrears on his child support obligations and that he had not resumed payments until ordered to do so as part of his original sentence on the cocaine conviction, that his deportation would not cause extreme hardship for his children or girlfriend, and that his parents and two siblings still lived in Antigua. The Board also emphasized that Henry had shown no signs of rehabilitation, particularly in view of the second cocaine charge, which had resulted in the revocation of his probation. Henry petitioned for review of the Board's dismissal of his appeal (No. 92-2252), which we consider below in Part II. A.

After retaining new counsel, Henry filed two motions to reopen his section 212(c) application pursuant to 8 C.F.R. § 3.2.[5] The first, filed on December 9, 1991, asserted that

[5] That regulation, which permits an alien to file a motion to reopen or to reconsider any decision of the Board, provides as follows:

> The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any

(Footnote continued on following page)

Henry had received ineffective assistance of counsel in presenting his section 212(c) application. Henry complained that his counsel had presented no witnesses other than Henry himself at the original hearing and that he had not filed a brief in support of Henry's appeal to the Board, so that the Board had dismissed the appeal without the benefit of written argument on Henry's behalf. The motion to reopen was accompanied by a number of affidavits from friends and family members attesting to Henry's good character and indicating that they would have testified on Henry's behalf at the initial hearing if they had been asked to do so. Henry also submitted a marriage certificate reflecting his recent marriage to a United States citizen, a receipt reflecting a child support payment, and a letter from Henry's church. The Board found that Henry had failed to comply with its requirements for asserting an ineffectiveness claim. But the Board also considered the claim on its merits and rejected it, finding that Henry had received a full and fair hearing, that his counsel had presented substantial evidence in his favor, and that the additional evidence would have been largely cumulative. The Board also found that Henry was ineligible for section 212(c) relief in any event because his status as a lawful permanent resident had terminated with entry of the Board's final administrative order of deportation. Henry petitioned for review of the Board's denial of this motion to reopen (No. 92-1476), which we consider in Part II. C.

Henry filed a second motion to reopen on June 5, 1992, this time attempting to supplement his section 212(c) ap-

[5] *continued*

departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purpose of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

plication with facts that arose after the first motion had been filed. Henry asked the Board to consider that his father recently had died, that his mother and sister had emigrated from Antigua to the United States, and that his mother had cancer. Henry argued that he retained eligibility to supplement his application because his appeal of the Board's final order of deportation was still pending here. The Board this time denied Henry's motion solely on the ground that he was statutorily ineligible to seek section 212(c) relief. The Board concluded that a final order of deportation had been entered December 7, 1990, when it dismissed Henry's appeal of the IJ's denial of section 212(c) relief, and that the finality of the deportation order was unaffected by Henry's petition for review of that order. Henry then petitioned for review of this final denial (No. 92-2801), which we address in Part II. B.

B. Nikola Akrap

Akrap, meanwhile, became subject to a final administrative deportation order on July 2, 1991, and we denied a petition for review of that order on June 26, 1992. *Akrap v. INS*, 966 F.2d 267 (7th Cir. 1992).[6] Like Henry, Akrap is subject to deportation for a cocaine conviction in Illinois state court, and both the IJ and the Board denied his application for a section 212(c) waiver of deportation.

Akrap also filed two motions to reopen. The first, submitted on August 2, 1991, requested that the Board consider supplemental evidence relating to the deteriorating health of Akrap's father and to the political unrest in Yugoslavia and Croatia. The Board denied the motion, finding that Akrap had become statutorily ineligible for section 212(c) relief when the Board entered its final order of deportation. Because Akrap did not petition for review

[6] We described Akrap's circumstances in that decision and will not repeat them here. *See id.* at 268-69.

of that denial, it is not before us.[7] Instead, Akrap filed a second motion to reopen requesting two types of relief: (1) that the Board designate Croatia (rather than Yugoslavia) as the country of deportation because Croatia recently had declared its independence from Yugoslavia and Akrap had been born there; and (2) that the Board consider supplemental evidence relating to his father's death, to the civil war between Serbia and Croatia, and to the deteriorating conditions that he and his family would face if forced to return to Croatia. The Board redesignated Croatia as Akrap's country of deportation but denied the motion to reopen in all other respects. The Board also refused to reconsider its earlier ruling that Akrap was statutorily ineligible for section 212(c) relief in light of *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991), which had reversed a finding of statutory ineligibility in similar circumstances. The Board explained that it did not agree with *Vargas* and would not follow that decision outside the Second Circuit. The Board thus refused to consider Akrap's supplemental evidence, and he now asks that we review that decision. We do so in Part II. B.

We have jurisdiction over all four petitions for review pursuant to 8 U.S.C. § 1105a(a)(1).

II. DISCUSSION

A. Denial of Henry's Request for Section 212(c) Relief

In his first petition, Henry challenges the Board's dismissal of his appeal of the IJ's denial of a discretionary waiver of deportation under section 212(c). Henry specifically contests the Board's requirement that he show "unusual or outstanding equities." We review the Board's decision

[7] On his first petition for review, Akrap requested that we consider the Board's denial of his motion to reopen, but we lacked jurisdiction to review that ruling because the Board had not yet rendered a final decision on that motion when Akrap filed his petition, and Akrap did not file a separate petition for review once it became final. *Id.* at 269-71.

for an abuse of discretion; we may reverse only if the decision " 'was made without a rational explanation, . . . inexplicably departed from established policies, or rested on an impermissible basis.' " *Cortes-Castillo v. INS*, 997 F.2d 1199, 1203 (7th Cir. 1993) (quoting *Espinoza v. INS*, 991 F.2d 1294, 1297 (7th Cir. 1993)); *see also Akinyemi v. INS*, 969 F.2d 285, 288 (7th Cir. 1992). Based on the evidence of record from Henry's deportation hearing, the Board did not abuse its discretion in denying Henry's application for a waiver of deportation.

In considering a section 212(c) application, the Board must balance "the social and humane considerations in the alien's favor against any adverse factors that demonstrate his or her undesirability as a permanent resident in the United States." *Cortes-Castillo*, 997 F.2d at 1202; *see also Akinyemi*, 969 F.2d at 288; *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1247 (7th Cir. 1991). The Board's now familiar decision in *In re Marin*, 16 I. & N. Dec. 581 (BIA 1978), guides our analysis of the relevant factors. As we reiterated in *Cortes-Castillo*:

> [f]actors favoring relief include:
>
> > [F]amily ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g. affidavits from family, friends, and responsible community representatives).
>
> *Marin*, 16 I. & N. [Dec.] at 584-85. Adverse factors include the nature and underlying circumstances of the exclusion ground at issue, any additional significant violations of this country's immigration laws, the

> nature, recency, and seriousness of a criminal record, and any other evidence of an alien's bad character or undesirability as a permanent resident. *Id.* at 584.

997 F.2d at 1202; *see also Akinyemi*, 969 F.2d at 288; *Cordoba-Chaves*, 946 F.2d at 1247.

The Board must review the applicant's evidence in light of these factors and provide a reasoned explanation for its discretionary decision, demonstrating that it considered the evidence supporting the application and enabling " 'a reviewing court to perceive that it has heard and thought and not merely reacted.' " *Vergara-Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992) (quoting *Becerra-Jimenez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)); *see also Cortes-Castillo*, 997 F.2d at 1203. The Board satisfied its obligations here.

After reviewing Henry's evidence in support of his application, the Board agreed with the IJ that Henry did not merit a waiver of deportation. In light of the seriousness of Henry's cocaine offense and his overall criminal record, the Board required Henry to show "unusual or outstanding equities" to justify relief. The Board observed:

> The respondent's equities are not particularly unusual or outstanding, and they do not overcome the negative factors of record. The respondent's residence in the United States has not been long and it did not begin at a young age. The respondent has provided no evidence of any close relationship to his two children. In addition, the record reveals that the respondent resumed support payments for his daughter after approximately 6½ years and only pursuant to a court ordered condition of his sentence. There is no evidence in the record to indicate that any hardship would befall the respondent's two children, girlfriend, or other family members if he is deported. The respondent's parents and two other siblings still reside in Antigua. Further, the respondent has not exhibited any evidence of rehabilitation. The respondent admitted to the possession of a vial of cocaine intended for his

> own personal use within approximately 8 months of his felony conviction for delivery of cocaine and while he was on probation. He was found in violation of probation on July 21, 1988, based on a charge that he possessed a substance containing cocaine with intent to deliver on June 20, 1988, and was sentenced to 5 years in prison.

(Henry App. Ex. 1, at 3-4.) The Board thus offered a rational explanation for its decision and did not depart from established policies or rest its decision on an impermissible basis. *See Cortes-Castillo*, 997 F.2d at 1203. Indeed, Henry's primary challenge to the Board's discretionary decision goes not to the result of its weighing process but to the Board's requirement that he show "unusual and outstanding equities." Yet we have consistently upheld such a requirement where deportability is based on a serious drug offense. *See, e.g., id.* at 1202-03; *Akinyemi*, 969 F.2d at 288-89; *Cordoba-Chaves*, 946 F.2d at 1247, 1249; *see also Nunez-Pena v. INS*, 956 F.2d 223, 225 (10th Cir. 1992). The Board therefore did not abuse its discretion in requiring Henry to show unusual or outstanding equities, or in finding that he failed to do so. *See, e.g., Chavez-Arreaga v. INS*, 952 F.2d 952, 953-54 (7th Cir. 1991).[8] We accordingly deny Henry's petition for review in appeal No. 91-2252.

B. Statutory Eligibility to Reopen Section 212(c) Applications

Because Henry's petition for review in appeal No. 92-2801 and Akrap's petition in appeal No. 92-3104 present a common question, we consider those petitions together. Both Henry and Akrap maintain that they were eligible to reopen their section 212(c) applications even after the

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[8] Given the strong evidence suggesting a lack of rehabilitation (*i.e.*, Henry's subsequent drug offenses), it is unlikely that the Board would have exercised its discretion in Henry's favor even if it had not required him to establish unusual or outstanding equities.

Board had entered final orders of deportation. The Board disagreed, holding that their status as lawful permanent residents ended with entry of the deportation orders and that they therefore became ineligible for section 212(c) relief at that time. The circuits have split on whether the Board's position should be upheld. *Compare Katsis v. INS*, 997 F.2d 1067 (3d Cir. 1993) (upholding Board's rule) *and Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 1412 (1993) *with Goncalves v. INS*, Nos. 92-1122 & 92-2272, 1993 U.S. App. LEXIS 24776 (1st Cir. Sept. 28, 1993) (setting aside rule because Board has failed to adequately explain departure from its regulation); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (en banc) (rejecting Board's rule and overruling *Gonzales v. INS*, 921 F.2d 236 (9th Cir. 1990), which had accepted the rule) *and Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991) (finding rule arbitrary and capricious). We have yet to directly address the issue, but we hold today that the Board's position is an unreasonable interpretation of the INA and that Henry and Akrap remained eligible to reopen their section 212(c) applications even after they became subject to final orders of deportation. The Board should therefore have examined the proffered evidence of changed circumstances to determine whether to reopen their applications. We remand so that it may do so.

1. Standard of review

A preliminary question on which the circuits have disagreed is the standard under which the courts should review the Board's decision on this question. The Ninth Circuit has labeled the question "purely legal," calling for de novo review. *Butros*, 990 F.2d at 1144; *see also Gonzales*, 921 F.2d at 238. The Second Circuit, although reversing the Board's denial of a motion to reopen, conducted only a "limited review" where it sought "to determine whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Vargas*, 938 F.2d at 360 (citing *INS v. Abudu*, 485 U.S. 94 (1988)). The Fifth Circuit employed a similar standard in *Ghassan*,

reviewing the Board's decision for an abuse of discretion but also noting that because the denial of relief rested on a finding of statutory ineligibility, a review for errors of law also was required. 972 F.2d at 637. In that review, the court gave "great weight to the agency's interpretation of its own regulations" but was nonetheless prepared to discount any interpretation that was "plainly unreasonable." *Id.* The Third Circuit recently applied an even more deferential standard in *Katsis*. Relying on the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Third Circuit explained:

> "[C]ourts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 488, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987) (citations omitted), unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *See also Butros*, 990 F.2d at 1149 (Trott, J., dissenting).

997 F.2d at 1070. The court therefore decided to defer to the Board's interpretation so long as it was "permissible," which the court found it to be. *Id.* at 1070-71.

In *Variamparambil v. INS*, 831 F.2d 1362, 1366 (7th Cir. 1987), which also involved an alien's legal eligibility for section 212(c) relief (*see infra*, at 13-14), we relied on *Chevron* for the proposition that the Board's interpretation is entitled to deference and will be upheld as long as it is reasonable. *See also Perez-Rodriguez v. INS*, No. 92-3081, 1993 U.S. App. LEXIS 21659, *7 (7th Cir. Aug. 25, 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 944 (7th Cir. 1993) ("we must defer to the BIA's views so long as they are a reasonable reading of the INA on a question to which Congress has not spoken."); *Zalega v. INS*, 916 F.2d 1257, 1259 (7th Cir. 1990) ("To the extent that this case turns on the BIA's interpretation of the Immigration Act, our review is *de novo*; however, so long as its

interpretation is reasonable, we must defer to the BIA."). The Board's decisions here rest in part on its interpretation of "lawful permanent residence," as that term is defined in the INA, 8 U.S.C. § 1101(a)(20).[9] *See In re Cerna*, Interim Decision 3161, at 3 (BIA 1991) (alien's status as lawful permanent resident "changes" upon the Board's entry of a final administrative order of deportation); *see also Butros*, 990 F.2d at 1144. This interpretation is entitled to deference, assuming it is reasonable.

2. Reasonableness of the Board's interpretation

In denying the motions to reopen based upon statutory ineligibility, the Board relied on our *Variamparambil* decision as controlling authority. It is not. In that case, we considered the distinct question of whether an alien may accrue time toward section 212(c)'s seven-year residency requirement after a final order of deportation has been entered but before a circuit court has completed its review of that order. *See Perez-Rodriguez*, 1993 U.S. App. LEXIS 21659, at *12 ("The issue in *Variamparambil* was whether the alien's status as a lawful permanent resident had terminated before the seven-year period."). To resolve this question, we were required to consider the reasonableness of the Board's decision in *In re Lok*, 18 I. & N. Dec. 101 (BIA 1981), *aff'd on other grounds*, 681 F.2d 107 (2d Cir. 1982), that lawful domicile ends when an order of deportation becomes administratively final. *Variamparambil*, 831 F.2d at 1366. We found the Board's interpretation to be reasonable, agreeing with its concern that by "extending the time beyond the final administrative order

[9] That section provides that

> [t]he term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

8 U.S.C. § 1101(a)(20).

[we] would encourage spurious appeals made solely for the purpose of accumulating more time for § 212(c) relief." *Id.* We also agreed that this rule would not unduly prejudice aliens because if a petition for review were granted, the alien's lawful permanent resident status would be restored and the alien would then continue to accumulate time toward the seven-year residency requirement. *Id.* at 1367.[10] Our decision in *Variamparambil* means only that lawful permanent resident status terminates upon entry of a final order of deportation for purposes of fulfilling the seven years of lawful unrelinquished domicile required for section 212(c) relief. *See Perez-Rodriguez*, 1993 U.S. App. LEXIS 21659, at *12-13. *Variamparambil* does not address the separate question of whether petitioners like Henry and Akrap, who clearly satisfied the seven-year requirement when they initially applied under section 212(c), became statutorily ineligible to reopen their applications once the Board issued its final order.[11]

In addition to *Variamparambil*, the Board also relied on its own decisions in *In re Cerna*, Interim Decision 3161 (BIA 1991), and in *Lok* to support its decisions below. As our discussion of *Variamparambil* suggests, *Lok* is limited

[10] In approving the Board's rule, we relied on *Rivera v. INS*, 810 F.2d 540, 541-42 (5th Cir. 1987), where the Fifth Circuit found that the petitioner was ineligible to submit a section 212(c) application after entry of a final order of deportation. Unlike Henry and Akrap, however, Rivera had not requested section 212(c) relief prior to entry of the Board's order; he instead had filed a motion to reopen for that purpose. *See Garcia-Hernandez v. INS*, 821 F.2d 222, 224 (5th Cir. 1987) ("The issue in *Rivera* was whether a petition for § 212(c) relief could be instituted after a final decision of deportability by the BIA but before appeal to this Court."). The Fourth Circuit recently followed *Rivera* in *Nwolise v. INS*, No. 91-1173, slip op. at 7 (4th Cir. Sept. 3, 1993). Neither *Rivera* nor *Nwolise* address the decidedly different issue presented here.

[11] The Board is not alone in its overly broad interpretation of *Variamparambil*. The dissenting judges in *Butros*, 990 F.2d at 1151 (Trott, J., dissenting), similarly suggested that *Variamparambil* resolved the current question.

to the initial accrual of seven years' unre[illegible]shed domicile and does not address the question presented here. As the Second Circuit observed in *Vargas*, *Lok* (like *Variamparambil*), "stands only for the proposition that an alien cannot *become* eligible for discretionary relief through subsequent accrual of time towards the seven-year threshold, once he has conceded that he is deportable." 938 F.2d at 361 (emphasis in *Vargas*); *see also Goncalves*, 1993 U.S. App. LEXIS 24776, at *14-15.

In *Vargas*, the Second Circuit found that *Lok* could not reasonably be extended to circumstances like those presented here. *Vargas*, 938 F.2d at 360-61. In doing so, the Second Circuit broke ranks with the other circuits, which had found *Lok* to be an appropriate basis for the Board's statutory ineligibility rule. *See, e.g., Gonzales v. INS*, 921 F.2d 236, 239-40 (9th Cir. 1990), *overruled by Butros*, 990 F.2d at 1145; *Garcia-Hernandez v. INS*, 821 F.2d 222, 224 (5th Cir. 1987) (petitioner ineligible to reopen section 212(c) application after reviewing court had affirmed Board's original denial of section 212(c) relief).[12] As *Vargas* explained, however, the *Lok* rule should not be extended to the present circumstances because the motivation underlying *Lok*—"preventing an alien from manipulating deportability proceedings so as to acquire the seven years of domicile—is not present here." 938 F.2d at 361. The Second Circuit thus concluded that *Lok* alone could not justify the Board's decision. *Id.* The court also noted that the Board's extension of the *Lok* rule implicitly amended the Board's existing regulation, 8 C.F.R. § 3.2, which permits motions to reopen until an alien actually is deported. *Id.* at 361-62. For these and other reasons, the court found that the Board's decision was arbitrary and capricious and granted the petition for review. *Id.* at 363-64.

[12] In *Ghassan*, 972 F.2d at 637-38, the Fifth Circuit extended *Garcia-Hernandez* to the situation we confront here—where an alien has sought to reopen a section 212(c) application after entry of a final order of deportation but before the reviewing court has upheld the denial of section 212(c) relief.

Akrap's second motion to reopen asked the Board to reconsider its ineligibility finding in light of *Vargas*. The Board tersely responded that it disagreed with *Vargas* and therefore would not follow that decision outside the Second Circuit. The sole support it cited for rejecting *Vargas* was its own decision in *Cerna*,[13] which had reaffirmed Lok and attempted to address the Second Circuit's concerns about extending *Lok* to motions to reopen section 212(c) applications.

First, the Board addressed *Vargas*' statement that "[a] motion to reopen or to reconsider is not a request for a *new* decision," but such a motion "permits a decisionmaker to reevaluate the original decision." *Vargas*, 938 F.2d at 362. The Board distinguished between motions to reconsider and motions to reopen and criticized the Second Circuit for "inappropriately entwin[ing]" the two. *Cerna*, at 5. In the Board's view, motions to reconsider were unaffected by the *Lok* rule because they merely asked the Board to reconsider an earlier decision based on the same record:

> When we reconsider a decision, we are in effect placing ourselves back in time and considering the case as though a decision in the case on the record before us had never been entered. If the respondent was eligible for relief at the time the original decision was entered, then in reconsidering the decision we would treat his status as that which it had been at the time of the initial decision. The very nature of the motion to reconsider is that the original decision was defective in some regard.

Id. at 6. The Board characterized a request to reopen as "a fundamentally different motion," explaining:

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[13] In a footnote, the Board explained that *Vargas* was not binding in the Seventh Circuit in any event and that it was instead bound to follow our decision in *Variamparambil*. We have explained above why that decision does not support the Board's action in these cases.

> [A] motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing. We find nothing either inconsistent or illogical in holding that a respondent can move for reconsideration of a decision, which was entered while he was a lawful permanent resident and which denied relief under section 212(c), based on an argument that that decision was incorrectly entered, while a respondent who has lost his status as a lawful permanent resident cannot thereafter successfully move to reopen proceedings to have *a different application for relief under section 212(c) adjudicated on a different factual record.* Rather, we would find it inconsistent to conclude that an alien who is no longer a lawful permanent resident of the United States could have proceedings reopened to apply for relief only available to lawful permanent residents.

Id. at 6-7 (emphasis added).

The Board also took issue with *Vargas*' suggestion that its interpretation had effectively amended 8 C.F.R. § 3.2[14]

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[14] *Vargas* stated:

> The BIA's decision denying petitioner's motion also effectively amends an existing regulation without notice or opportunity for comment. This supports our conclusion that the decision is arbitrary and capricious. 8 C.F.R. § 3.2 provides that the BIA may hear motions to reconsider and reopen. Such motions may concern deportability and discretionary relief. Among other things, motions to reconsider and reopen may be based upon "circumstances which have arisen subsequent to the hearing."
>
> That regulation terminates an alien's ability to move to reconsider or reopen upon physical deportation. . . . The making of a motion to reconsider or reopen is not otherwise barred. . . .
>
> Here, however, the BIA's decision bars a motion to reopen or reconsider a decision under Section 212(c) not on the grounds of physical deportation, but because the BIA's order is "ad-

(Footnote continued on following page)

because, as the Board saw it, that regulation did not create an express right to reopen; instead, a proceeding need only be reopened once certain showings were made. *Id.* at 5. Finally, the Board cautioned that, in general, it was "not favorably disposed to the practice of waiting until the conclusion of the administrative appeal process to file a motion that seeks to offer additional evidence regarding the matter previously in issue." *Id.* at 7.

Subsequent to *Cerna*, an en banc panel of the Ninth Circuit joined *Vargas* in rejecting the Board's rule. *See Butros, supra*. *Butros* did not discuss *Cerna* but like the Second Circuit in *Vargas* focused on the Board's regulation, 8 C.F.R. § 3.2. The court thought the Board's finding of statutory ineligibility contradicted the regulation, for "the right to move to reconsider or to reopen is nowise limited by reference to the administrative finality of the Board's initial decision." 990 F.2d at 1144. The court reasoned that if the Board's position were accepted, there essentially would be "no such thing as reconsideration or reopening for the petitioner who lost on the first round," yet the Board's own regulation permits just that. *Id.* This, the court observed, "is to engage in contradiction." *Id.* In overruling its decision in *Gonzales*, which had applied *Lok* to a situation where the seven-year residency requirement had already been met, the Ninth Circuit explained that "[t]he fallacy of *Gonzales* is the belief that what is final for certain administrative purposes is final for all purposes." *Id.* at 1145.[15] "[A]s long as the Board may reconsider or reopen the case, the status of

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[14] *continued*

ministratively final." The decision thus prevents a large group of aliens (those subject to orders of deportability issued by the BIA) from making the very motions to reconsider or reopen contemplated by 8 C.F.R. § 3.2.

938 F.2d at 362.

[15] As we do, the court thought that *Lok* was limited to the question of "when an alien ceases to accumulate credit toward seven years of lawful permanent residence." *Id.* at 1146.

the petitioner in that case for purposes of section 212(c) relief has not been finally determined for purposes of action by the Board." *Id.* The court also found that any concern with endless applications to reopen was allayed by the regulation itself, which only permits such motions before a petitioner's departure from the United States. *Id.* at 1145-46.

Three months later, the Third Circuit rejected both *Butros* and *Vargas* when it upheld the Board's finding of statutory ineligibility. *See Katsis, supra.* Operating on the assumption that it need only find the Board's interpretation of the INA to be "permissible," the Third Circuit had no difficulty in applying *Lok*'s finality principle to a case where the seven-year domicile requirement had been met. The court found the Board's rule "permissible" "[i]f for no other reason than ease of application," because "it is reasonable to attempt to establish one single standard for the time an alien's lawful permanent resident status changes for all purposes under section 212(c)." *Katsis*, 997 F.2d at 1073. The court likened the rule to a statute of limitations because it sets "the last day upon which an alien can establish statutory eligibility for section 212(c) relief on a motion to reopen proceedings." *Id.*[16] In the court's view, this bright-line rule "sets the last day through which an alien can manipulate deportation proceedings by his or her after-the-fact manufacture of additional evidence of equities to balance the adverse factor or factors he or she must overcome to receive discretionary relief under section 212(c)." *Id.* The Board's rule therefore "reduces the incentive to file meritless petitions for review in the circuit courts, which lessens the burdens on those courts, just to buy the alien more time to create after-the-fact evidence of equities." *Id.* at 1074.

[16] The court explained that "[t]his unambiguous cut-off date discourages unnecessary and prolonged litigation by its very clarity, promotes finality, and avoids adjudication of stale claims as all statutes of limitations do." *Id.*

We find *Katsis* problematic in several respects. First, it assumes that aliens always manufacture equities to support their applications for a discretionary waiver of deportation and that they have ample time to engage in such "manipulation" *before* a final administrative order of deportation is issued. Thus, the court took a rather skeptical view of the evidence that might be offered after that time:

> [I]f it takes longer than the period between the IJ's determination of deportability and ineligibility for section 212(c) relief and the Board's affirmance of that determination for an alien to find (or create) new evidence, either (1) the alien has not been sufficiently diligent in his efforts, (2) the probabilities do not favor the existence of material evidence unavailable at the time of the IJ's decision, (3) any such evidence that may exist is stale, or (4) the alien should be given no more time to create evidence after the fact.

Id. at 1075. We do not share the Third Circuit's view that all evidence weighing in favor of an alien has somehow been manufactured. Although some evidence relevant to the section 212(c) inquiry may be subject to manipulation (*e.g.*, the alien's marital status or whether he has family remaining in the country of deportation), *Katsis* fails to account for cases where circumstances change with no help from the alien. Akrap, for example, did not manufacture either the conflict in Croatia or the death of his father, and Henry did not manufacture his father's death or his mother's illness. Because the petitioners had no control over the fact that these events occurred after their deportation hearings and the entry of final orders of deportation, the belated nature of their motions to reopen cannot be attributed to a lack of "sufficient diligence." We also cannot simply dismiss the evidence as probably immaterial, as *Katsis* suggests. *See id.* "Manufactured" evidence can of course be weeded out when the Board considers whether to reopen proceedings in the exercise of its discretion. That concern therefore does not justify a

rule precluding *all* evidence of changed circumstances at the outset. *See Butros*, 990 F.2d at 1146 (Fernandez, J. concurring).[17]

We also find the Third Circuit's analogy to a statute of limitations inapt. *See Katsis*, 997 F.2d at 1073. The Board's rule does not operate like a statute of limitations because both Henry and Akrap (and Katsis, Butros, and Vargas for that matter) already petitioned for a discretionary waiver of deportation before entry of a final administrative order of deportation. They thus satisfied any "statute of limitations" and are simply seeking to reopen their earlier applications to enable the Board to consider new evidence. Their motions are thus not unlike those under Fed. R. Civ. P. 60(b), in which parties seek relief from a final judgment to present newly discovered evidence. *See Butros*, 990 F.2d at 1146 (Fernandez, J., concurring). In the civil arena, such relief is not prohibited after entry of a final judgment, and the Board's own regulation recognizes that it should not be foreclosed in this context either. *See* 8 C.F.R. § 3.2.

Granted, our analysis diverges from *Cerna*'s conclusion that a motion to reopen, unlike a motion to reconsider, constitutes a new, unrelated application for section 212(c) relief. *See Cerna*, Interim Decision 3161, at 6-7; *see also supra*, at 16-17. Yet we find the distinction drawn by the Board in *Cerna* to be somewhat artificial. Simply because a motion to reopen contemplates the consideration of additional evidence does not make it "a different application" that must be "adjudicated on a different factual record." *Cerna*, Interim Decision 3161, at 6. Rather, the underlying application presumably remains the same, as does

[17] We similarly disagree with *Katsis* that the Board's rule is reasonable simply because of its "ease of application." *See Katsis*, 997 F.2d at 1073. When a matter as serious as deportation from this country is at issue, we should not focus on ease of application, for "easy" rules often preclude any inquiry into individual equities, which is what section 212(c) is all about.

the factual record; they are simply supplemented with the new evidence.[18] It is inconceivable that the Board would commence an entirely new proceeding with no reference to the earlier application. We therefore agree with *Vargas* that a motion to reopen merely revives the earlier section 212(c) application and does not constitute an entirely new request for discretionary relief. *See Vargas*, 938 F.2d at 362; *see also Butros*, 990 F.2d at 1145. The Board's contrary position is strained and unreasonable.

As for the scope of 8 C.F.R. § 3.2, the Board maintained in *Cerna* that it was not obliged to reopen proceedings because the " 'regulation is framed negatively' " and " 'it directs the Board not to reopen unless certain showings are made.' " *Cerna*, Interim Decision 3161, at 5 (quoting *INS v. Jong Ha Wang*, 450 U.S. 139, 144 n.5 (1981)). Yet the required "showings" relate to whether the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2. It is quite possible that both Henry and Akrap could make these showings, yet they have been denied the opportunity even to try on the ground that they are subject to administratively final orders of deportation. Although the Board does have broad discretion to deny motions to reopen (*see INS v. Doherty*, 112 S. Ct. 719, 720 (1992); *INS v. Abudu*, 485 U.S. 94, 105-06 (1988)), the regulation does not empower the Board to deny such a motion solely on the ground offered here. *See Butros*, 990 F.2d at 1144; *Vargas*, 938 F.2d at 361-62. The Board's interpretation thus amounts to an amendment of the regulation, made without the benefit of notice and the opportunity for public comment.

We are not deciding today that either Henry or Akrap has established a right to discretionary relief under sec-

[18] In fact, Akrap's counsel informed us at oral argument that the Board itself does *not* require a new application, nor does it require payment of a new filing fee when a motion to reopen an earlier section 212(c) application is submitted.

tion 212(c), or even that the Board must reopen their section 212(c) applications. But we do find that both Henry and Akrap survive the first hurdle—they remain statutorily eligible to pursue section 212(c) relief because both are seeking only to reopen timely section 212(c) applications where both have established the seven years of lawful unrelinquished domicile. They are therefore entitled to have their supplemental evidence considered. Because we find the Board's interpretation of the INA and its own regulation to be unreasonable, we grant the petitions for review in appeal Nos. 92-2801 and 92-3104 and remand both cases to the Board.

C. Board's Denial of Henry's First Motion to Reopen

Although it believed that Henry was statutorily ineligible for section 212(c) relief when he filed both his first and second motions to reopen, the Board considered the merits of Henry's first motion and denied the motion on that ground as well. The Board's reliance on the statutory ineligibility ground was erroneous, but we must affirm the Board in appeal No. 92-1476 if it did not abuse its discretion in denying the motion on the merits.

As we explained in *Johnson v. INS*, 962 F.2d 574, 576 (7th Cir. 1992), the Board may deny reopening on at least three independent grounds:

> failure to establish a prima facie case for the underlying relief sought; failure to introduce new, material evidence previously unavailable which was not considered in the initial review; or a determination that even if the two previous conditions existed, the movant would not be entitled to discretionary relief.

(citing *INS v. Abudu*, 485 U.S. 94, 104-05 (1988)). We review a denial under either of the first two grounds for an abuse of discretion, which would occur only if the denial "is made without rational explanation, inexplicably departs from established policies, or rests on an impermissible basis such as invidious discrimination against a

particular race or group." *Id.* at 577. A discretionary denial (the third possible ground) is also reviewed for an abuse of discretion, but in that instance we must only consider whether the Board's discretion was exercised arbitrarily or capriciously. *Id.*; *see also Garcia-Lopez v. INS*, 923 F.2d 72, 74 (7th Cir. 1991).

Henry's first motion to reopen was based on a claim that he had received ineffective assistance of counsel in presenting his section 212(c) application to both the IJ and the Board.[19] Henry suggested that his counsel had been ineffective because he presented no witnesses, other than Henry himself, in support of the application and because he failed to file a brief in support of Henry's appeal to the Board. Numerous friends and family members submitted affidavits attesting to Henry's character and stating that they would have testified at Henry's deportation hearing if Henry's former counsel had asked them to do so. The Board found that Henry was ineligible for discretionary relief based on ineffectiveness because he had not complied with the requirements of *In re Lozada*, 19 I. & N.

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[19] Henry also now suggests that he was denied due process insofar as the IJ did not advise him of the right to have counsel of his choice or of the availability of free legal services. Moreover, the IJ seemingly ignored Henry's direct "No sir" when asked whether the gentleman appearing on his behalf was his lawyer. Although we are certainly disturbed by the IJ's willingness to proceed in the face of Henry's response, we believe that Henry waived this due process argument by failing to raise it before the Board. In neither of the two motions to reopen did Henry advance this argument, which is especially troubling because the first motion focused almost exclusively on the ineffectiveness of counsel. We will not entertain an argument made for the first time in a petition for review when Henry had the opportunity but failed to first present the issue to the Board in either of his motions to reopen. *See Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993) (declining to consider ineffectiveness claim that was not raised on appeal to the Board but which was the subject of a pending motion to reopen); *see also Perez-Rodriguez*, 1993 U.S. App. LEXIS 21659, at *18-20.

Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).[20] Nonetheless, the Board reached the merits of Henry's claim and concluded that Henry had received a full and fair hearing, that his former counsel had presented substantial evidence in his favor, and that the new affidavits were largely cumulative. The Board accordingly "found no basis" for Henry's ineffective assistance claim.

It is well settled that deportation hearings are in the nature of civil proceedings and that aliens therefore "have no constitutional right to counsel under the Sixth Amendment." *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993); *see also Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986). We explained in *Castaneda-Suarez*, however, that "counsel at a deportation hearing may be 'so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.' " 993 F.2d at 144 (quoting *Magallanes-Damian*, 783 F.2d at 933); *see also Saleh v. United States Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992). Yet ineffectiveness rises to the level of a due process violation only " 'if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.' " *Lozada*, 857 F.2d at 13 (quoting *Ramirez-Durazo v. INS*, 794 F.2d 491, 499-500 (9th Cir. 1986)).

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[20] The Board explained that *Lozada* requires:

> (1) that the motion be supported by an affidavit by the respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in that regard; (2) that counsel be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why.

(Henry App. Ex. 2, at 2-3.)

Even if we were to assume that counsel was ineffective in presenting Henry's request for section 212(c) relief at the deportation hearing and on appeal to the Board, and that counsel's ineffectiveness resulted in a denial of due process, we believe that in these circumstances the Board may cure any "fundamental unfairness" if it carefully considers the supplemental evidence that accompanies the second motion to reopen. *See Lozada*, 857 F.2d at 14 (Board's careful attention to motion to reopen negated any due process violation). We are confident that on remand the Board will consider all available evidence, including the numerous affidavits, in determining whether to reopen Henry's request for discretionary relief.[21] In the end, therefore, the Board's resolution of the section 212(c) application should not depend on whether Henry's former counsel was ineffective. We accordingly deny the petition for review in appeal No. 92-1476.

III. CONCLUSION

For the foregoing reasons, we DENY Henry's petitions for review in appeal Nos. 91-2252 and 92-1476. We GRANT Henry's petition for review in appeal No. 92-2801 and Akrap's petition for review in appeal No. 92-3104, and REMAND both cases to the Board so that it may consider whether to reopen petitioners' applications for discretionary waivers of deportation under section 212(c).

IT IS SO ORDERED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[21] If it refuses to do so, we may again entertain the ineffectiveness claim in a subsequent petition for review.

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United States Court of Appeals
For the First Circuit

No. 92-1122
No. 92-2272

JOSE MANUEL GONCALVES,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

Before

Breyer, Chief Judge,
Selya and Stahl, Circuit Judges.

David Yavner for petitioner.
Donald Keener, Acting Assistant Director, with whom Stuart M. Gerson, Assistant Attorney General, Civil Division, Anne C. Arries, Attorney, Office of Immigration Litigation, Civil Division, Department of Justice, and David M. McConnell, Attorney, Office of Immigration Litigation, Civil Division, Department of Justice, were on brief for respondent.

September 28, 1993

BREYER, Chief Judge. The Board of Immigration Appeals has a general procedural rule that says it "may . . . reopen or reconsider any case in which it has rendered a decision." 8 C.F.R. § 3.2 (1993). In a series of cases, however, the Board has developed an exception to this procedural rule. The exception relates to a certain kind of Board decision: whether or not to grant "discretionary relief" which would permit an alien, otherwise "deportable," nonetheless to remain in the United States. Immigration and Nationality Act (INA) § 212(c), 8 U.S.C. § 1182(c). According to the procedural exception, once the Board has denied the alien's initial "discretionary relief" application (and thus the Board has finally found the alien "deportable"), the alien may not ask the Board to reopen his deportation proceedings for further consideration of his application. See, e.g., Matter of Cerna, Int. Dec. 3161, slip op. at 3-4 (BIA Oct. 7, 1991).

This appeal requires us to decide whether the Board's "no reopening" exception to its ordinary "reopening" rule is lawful. The Third and Fifth Circuits have held that it is lawful. See Katsis v. INS, 997 F.2d 1067 (3d Cir. 1993); Ghassan v. INS, 972 F.2d 631, 637 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993); see also Cerna v. INS,

979 F.2d 212, 213 (11th Cir. 1992) (table), aff'g without opinion Matter of Cerna, Int. Dec. 3161 (BIA Oct. 7, 1991). The Second and Ninth Circuits have held that it is not. See Butros v. INS, 990 F.2d 1142 (9th Cir. 1993) (en banc); Vargas v. INS, 938 F.2d 358 (2d Cir. 1991). We, like the latter two circuits, do not understand the basis for the "no reopening" exception. In our view, the Board has not properly explained why it will consider motions to reopen in most cases but not in the particular circumstances illustrated here. We therefore hold that the Board may not invoke this exception as grounds for refusing to consider the petitioner's motion to reopen in this case, and we remand the case to the Board for further consideration of that motion.

I

A. Legal Background

To understand the issue before us, the reader must keep in mind the following legal background. First, the INA lists a host of grounds for excluding or deporting aliens, including conviction of a drug-related crime. See, e.g., 8 U.S.C. §§ 1182(a)(2) (exclusion), 1251(a)(2)(B) (deportation). The Act also says that a certain class of these "deportable" aliens -- those who have lived here for seven years as aliens "lawfully admitted for permanent residence" -- can ask the

Attorney General (i.e., the Board, see 8 U.S.C. § 1103(a); 8 C.F.R. §§ 3.0, 3.1(a), (b)(3), 212.3(a)(2), (e)(3) (1993)) to exercise a kind of equitable discretion that would permit them to remain here even though they have, for example, committed a drug crime. INA § 212(c), 8 U.S.C. § 1182(c) (see Appendix for text). The Act defines the class of those eligible for this relief as those who, for seven years,

> hav[e] been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

8 U.S.C. § 1101(20) (emphasis added) (defining "lawfully admitted for permanent residence").

Second, an Immigration Judge (IJ) normally will make the initial decision as to whether a particular alien is "deportable," 8 C.F.R. § 242.8(a) (1993), and if so, whether he is eligible to apply for section 212(c) "discretionary relief." Id. § 212.3(a)(2), (e). If the alien is eligible, the IJ will further decide whether, given the "equities," the Attorney General will grant that relief. Id.; Matter of Marin, 16 I. & N. Dec. 581, 584 (BIA 1978); see generally 3 Charles Gordon & Stanley Mailman, Immigration Law and Procedure § 74.01[2][a]-[b] (1993). If dissatisfied with the result, the alien may appeal to the Board of Immigration

Appeals, 8 C.F.R. §§ 3.1(b)(3), 212.3(e)(3) (1993), which may hold a hearing, take evidence and decide the issues de novo. Hazzard v. INS, 951 F.2d 435, 440 n.4 (1st Cir. 1991); Matter of Lok, 18 I. & N. Dec. 101, 106 (BIA 1981); 1 Gordon & Mailman, supra, § 3.05[5][b]. If the Board reaches a negative decision, the regulations (while phrased negatively, see infra pp. 9 - 10) indicate that the alien normally may ask the Board either to reconsider its decision or to reopen the proceeding in light of "circumstances which have arisen subsequent to the hearing." 8 C.F.R. § 3.2 (1993). The Supreme Court has pointed out that the regulation governing motions to reopen "does not affirmatively require the Board to reopen the proceedings under any particular condition." INS v. Jŏng Ha Wang, 450 U.S. 139, 144 n.5 (1981) (per curiam). The issue before us, however, concerns not whether the Board must grant the motion, but whether it must consider it.

Third, despite these regulations, the Board has held in a series of cases that an alien, resident here lawfully for seven years but under an administratively final deportation order, may not ask the Board to reopen a proceeding ordering deportation to obtain further consideration of "discretionary relief" under section 212(c). The Board has based these holdings on the theory that a final Board decision ordering

deportation means that the alien's "status" has "changed." He is therefore no longer "lawfully admitted for permanent residence," see 8 U.S.C. § 1101(20), and thus falls outside the category of those whom section 212(c) permits to ask for discretionary relief. And since the alien would now be ineligible to apply for section 212(c) relief in the first instance, see, e.g., Rivera v. INS, 810 F.2d 540, 541 (5th Cir. 1987), the Board reasons that he also may not move to reopen a previously decided section 212(c) application. See, e.g., Katsis, 997 F.2d at 1069; Butros, 990 F.2d at 1143. The Board does not, however, deny the alien the right to move for reconsideration of the earlier section 212(c) application. Cerna, slip op. at 5.

B. Factual Background

The case before us involves a resident alien, Jose Manuel Goncalves, who entered the United States as a baby in 1968 and who has lived here ever since. He has committed serious crimes, including drug crimes. In late 1989, the INS began deportation proceedings. Goncalves conceded that he was deportable. Goncalves then asked the Attorney General to exercise equitable discretion in his favor under section 212(c). An IJ rejected this request on May 21, 1991 and ordered him deported. On January 8, 1992, the Board of

Immigration Appeals, after weighing the various equities for and against Goncalves, also rejected the "discretionary relief" request and affirmed the IJ, thus rendering Goncalves' deportation order "final." 8 C.F.R. § 243.1 (1993). Goncalves then moved to reopen the deportation proceeding so that he could present letters and an employment record that, in his view, amounted to new evidence of his rehabilitation sufficient to change the outcome of the Board's "discretionary" calculus.

After a series of proceedings not here relevant, the Board, on October 8, 1992, denied the motion to reopen on the sole ground that Goncalves, his "status . . . having changed" by virtue of the Board's "final" deportation order of January 8, 1992, was no longer "lawfully admitted for permanent residence" and therefore "[could] not establish a prima facie case for relief." The Board did not address the merits of his request to reopen. Goncalves now appeals the Board's denial of his motion to reopen. He argues that the law requires the Board at least to consider it. We believe he is correct.

II

Analysis

The Board's refusal to allow aliens to make certain "reopening" motions is, in essence, a detail of its procedure. In deciding the lawfulness of such a detail, we recognize that Congress intended the Attorney General to have considerable leeway in working out the precise procedures for determining contested issues related to deportation and "discretionary relief." 8 U.S.C. §§ 1103(a), 1182(c). The Attorney General has delegated the authority to work out such procedures to the Board. 8 U.S.C. § 1103(a); 28 C.F.R. §§ 0.115-0.117 (1991); 8 C.F.R. §§ 3.0, 3.1(a), 3.1(d)(3) (1993). We therefore must respect the Board's judgment in such matters. See, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940); Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 920 F.2d 50, 54 (D.C. Cir. 1990); American Trucking Ass'ns v. United States, 627 F.2d 1313, 1320-21 (D.C. Cir. 1980) (deferring to agency regulations governing intervention on ground that "procedural regulations are generally within the discretion of the agency"); Wagner Seed Co. v. Bush, 946 F.2d 918, 920 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992). The Administrative Procedure Act provides, however, that the Board may not act arbitrarily or "abuse" its

"discretion." 5 U.S.C. § 706(2)(A). And, even though we give the Board considerable leeway, we nonetheless conclude that it has acted arbitrarily in this instance. We reach this conclusion for the following three reasons, taken together.

First, one of the Board's procedural regulations strongly suggests that it will permit motions to reopen in cases of this sort. The regulation first makes clear that "[t]he Board may . . . reopen or reconsider any case in which it has rendered a decision" (unless the motion is made after the alien has left the United States). 8 C.F.R. § 3.2 (1993) (emphasis added). The regulation then says the following:

> Reopening or reconsideration of any case in which a decision has been made by the Board, whether [or not] . . . requested by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen . . . shall not be made by . . . a person who is the subject of deportation

> proceedings subsequent to his departure from the United States.

Id. We recognize that the regulation is phrased in negative terms, which means that it does not explicitly grant any right to anyone ever to ask to reopen a proceeding. Nonetheless, consider the words

> nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted . . . unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

Id. (emphasis added). Coupled with the Board's explicit authority to reopen any case, what could those words mean but that the alien does have a right to move for reopening to ask for "discretionary relief . . . on the basis of circumstances which have arisen subsequent to the rehearing"? See Butros v. INS, 990 F.2d 1142, 1144 (9th Cir. 1993) (en banc) ("Board's regulations do say[] that you may have a second round"). But cf. Katsis v. INS, 997 F.2d 1067, 1073 n.6 (3d Cir. 1993) (arguing that the emphasized language is "hardly a rousing encouragement for or approval of using evidence manufactured after the fact . . . to support a motion to reopen"). An agency, of course, has every right to interpret its own rules. E.g., Stinson v. United States, 113 S. Ct. 1913, 1919 (1993); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

But there are limits, set by what is "reasonable." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-66 (1980); Commonwealth of Massachusetts, Dept. of Public Welfare v. Secretary of Agriculture, 984 F.2d 514, 524 (1st Cir. 1993) ("an administrative agency enjoys great latitude to interpret its own rules as long as those interpretations are reasonable") (emphasis added). And the agency must follow its own rules, as reasonably interpreted. Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co., 284 U.S. 370, 389-90 (1932).

Second, the Board, while claiming that its exception is a reasonable "interpretation" of its regulation, reached that interpretation by following a complicated logical syllogism that, in our view, is either irrelevant or erroneous. The syllogism runs approximately as follows:

> (1) The INA allows section 212(c) "discretionary relief" only upon the request of a resident alien whose "status" has not "changed." See 8 U.S.C. §§ 1101(20), 1182(c); supra pp. 3 - 4.
>
> (2) The INA does not say just when, during a deportation proceeding, the alien's "status . . . change[s]."
>
> (3) The Board thus has considerable legal leeway in interpreting the statute with respect to the precise time when "status . . . change[s]." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Matter of Cerna, Int. Dec. 3161, slip op. at 10 (BIA Oct. 7, 1991) (citing Chevron).

(4) In Matter of Lok, 18 I. & N. Dec. 101, 106 (BIA 1981), and later cases, the Board held that a "status change" takes place at the time the Board enters a final deportation order. E.g., Nwolise v. INS, No. 91-1173, slip op. at 4, 7 (4th Cir. Sept. 3, 1993); Perez-Rodriguez v. INS, No. 92-3081, slip op. at 5, 7 (7th Cir. Aug. 25, 1993); Rivera v. INS, 810 F.2d 540 (5th Cir. 1987); cases cited supra pp. 2 - 3,

(5) Once that final deportation order is entered, then, since the alien's "status" has "changed" (see step (4)), the alien must be ineligible to ask for discretionary relief.

(6) A motion to reopen amounts to a request for discretionary relief.

Therefore, (7) an alien whom the Board orders deported cannot ask the Board to reopen the proceeding to request discretionary relief.

The flaw in this syllogism is that step (4) does not lead to step (5). The law permits the Board to decide (within reason) when a "change of status" takes place, but it also permits the Board to decide that moment differently for different purposes. Cf. Butros, 990 F.2d at 1145 (discussing the "fallacy of . . . the belief that what is final for certain administrative purposes is final for all purposes"). In Lok (the source of the problem), the Board considered a substantive question, namely, whether or not a person ordered deported after less than seven years of lawful residence could continue to accrue time towards the magic "seven years" while his deportation case was on appeal. Lok, 18 I. & N. Dec. at

102-05. The Board sensibly held that the "seven year" clock stopped ticking once the Board ordered deportation. It found that his "status" "changed" at that moment for the purpose of accruing time. See Vargas, 938 F.2d at 361 ("Matter of Lok, therefore, stands only for the proposition that an alien cannot become eligible for discretionary relief through subsequent accrual of time towards the seven-year threshold, once he has conceded that he is deportable."); Lok v. INS, 681 F.2d 107 (2d Cir. 1982); Lok, 18 I. & N. Dec. at 105.

Lok does not mean, however, that the alien's "status" must also "change" for the purpose of his eligibility to ask for reopening. After all, the Board itself agrees that the alien remains eligible to ask for reconsideration. 8 C.F.R. § 3.2 (1993); Matter of Cerna, Int. Dec. 3161, slip op. at 5 (BIA Oct. 7, 1991). Even after entry of the Board's "final" deportation order, the alien can call to the Board's attention evidence already in the record in an effort to show that the Board's denial of discretionary relief is unlawful or to convince it to exercise its "discretion" differently. Cerna, slip op. at 5-6. Moreover, the alien remains free to appeal the denial of discretionary relief to the courts. The entry of the Board's final order does not "change" his "status" for this purpose (if it did, it would moot the appeal

by making it impossible for the alien to receive "discretionary relief" even if he wins). See Butros, 990 F.2d at 1145. In short, Lok's substantive conclusion may or may not permit the procedural exception to the Board's reopening regulations at issue here, but it certainly does not require it.

Either the Board understands that step (4) does not compel step (5) (i.e., that Lok and other "substantive" change of status precedents do not legally compel its present position on motions to reopen), or it does not understand that. If it does not, then it has based its procedural exception upon a legal misunderstanding, in which case it must reconsider the matter. See Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam); SEC v. Chenery Corp., 318 U.S. 80, 93-95 (1943) (where agency's decision rests, in significant part, upon an incorrect view of what the law requires, court should set forth the correct view and remand the case for new agency decision). If it does understand that its procedural exception does not follow inevitably from Lok, then it has failed to explain why it adopted that exception, for its opinions on the matter, and its efforts to justify the exception in court, rely in large part upon Lok and a syllogism that is basically irrelevant. That syllogism --

based upon the substantive "change of status" statute, 8 U.S.C. § 1101(20) -- is irrelevant because the Board does not need to refer to the "change of status" statute to justify its procedural "no reopening" exception if that exception is reasonable, and reference to the statute cannot help the Board justify the exception if that exception is not reasonable. The basic question is the reasonableness of the exception, not the intricate maze of relationships between it and the substantive statute. And the reasonableness of the exception seems doubtful, given the fact that its finely-spun distinctions (e.g., allowing reconsideration but not reopening) have virtually no explanation apart from those based on the syllogism. See, e.g., Cerna, slip op. at 5-7.

Third, we say "virtually" because the Board does offer one practical consideration in an effort to answer the question "why is the 'no reopening' exception reasonable?." It says that the exception is reasonable because it will prevent aliens from "stringing out" their claims, i.e., by removing the possibility of the alien's asking for a reopening, the exception also removes the alien's temptation to withhold some evidence initially in order to obtain reopening after an adverse decision. Some courts have accepted this justification. See, e.g., Katsis, 997 F.2d at

1072, 1074. We cannot do so, however, both because the Board seems to rely more upon its logical syllogism than upon this practical justification, see, e.g., Cerna, slip op. at 3-7, and because the explanation itself raises fairly obvious questions that the Board has not yet answered.

Why, for example, isn't the Board's printed regulation -- limiting reopenings to those sought on the "basis of circumstances that have arisen subsequent to the hearing," see supra p. 10 -- sufficient to remove the temptation to withhold evidence, thus obviating the Board's practical concern? Why is the "stringing out" problem greater where "discretionary relief" involving seven year resident aliens is at issue than in other deportation cases? Why is the "stringing out" problem greater in such cases than where other "discretionary relief" matters, such as a request for suspension of deportation under INA § 244(a), are at issue? See 8 U.S.C. § 1254(a); 8 C.F.R. §§ 3.1(b)(2), 242.8(a), 242.22, 242.21(a), 244.1 (1993); 3 Gordon & Mailman, supra, § 74.07[5][e], [7]. Why does the Board absolutely forbid motions to reopen section 212(c) discretionary relief applications? Does it really believe that circumstances could never change enough, that even the most heroic, public spirited, self-sacrificing action by a seven year resident

alien, after the "final" deportation order, could not alter the outcome of the "equity" calculus? We do not say that no satisfactory answers to these questions exist, but we do say that the Board seems not to have asked them.

We stress, and we well understand, that the exigencies of the practical world in which the Board must work require that we do not, and we will not, expect the Board to answer every potentially relevant question regarding its procedures. Here, however, the problem goes beyond the fact that the Board has left obvious questions unanswered. More fundamentally, the Board has not focused directly on the basic question of whether or not the particular procedure before us is desirable, nor has it clearly explained its position. Further, it has instead unnecessarily relied on a logical syllogism involving a theoretical analysis of its own cases interpreting a statute of only marginal relevance to the problem, rather than squarely facing the practical question of whether the procedural exception is good or bad. Finally, it has acted in the face of a regulation that seems rather clearly to authorize the very kind of "reopening" motion that its cases then deny. Taking all these circumstances together, we find the practice insufficiently justified. That is to say, we find no legally adequate explanation of why the Board

has departed from the rule set forth in its own regulation. We therefore conclude that the Board's departure from that regulation is "arbitrary," and we set it aside.

III

Relief

Having set aside the Board's exception that absolutely forbids motions to reopen, we remand for consideration of the petitioner's motion to reopen his case. We shall not decide petitioner's further appeal of the Board's basic decision to deport him until the Board decides the motion to reopen.

We also have a suggestion. The circuit courts have now split three to two about the lawfulness of the "no reopening" exception. Obviously, the Board will be tempted to ask for Supreme Court review. There is, however, a simpler way. Why does the Board not consider amending its procedural regulations to reach the procedural result for which it argues here? Cf. Butros, 990 F.2d at 1144 ("The Board could, no doubt, alter this regulation . . . ."), 1146 (Fernandez, J., concurring) ("If the INS now wishes to adopt different regulations, that route is available to it."). If its exception makes sense, and it explains why that is so, all courts would respect the result. If the exception does not

make sense, the Board will not adopt it, and that will be the end of the matter. This suggestion is not, of course, legally binding, and there may be sound reasons not to follow it. Yet it seems to us to offer a fairly simple way out of what has become something of a legal morass, involving five courts of appeals threading their way through minor procedural details of a highly complex subject.

The petition in No. 92-2272 for review of the Board of Immigration Appeals' decision is granted, and the case is remanded for further proceedings consistent with this opinion. We do not reach the issues presented in No. 92-1122.

So ordered.

APPENDIX

INA § 212(c), 8 U.S.C.A. § 1182(c) (West Supp. 1993), provides in pertinent part:

> Aliens lawfully admitted for permanent resident [sic] who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)).

Although on its face this section applies only to resident aliens who have temporarily left the United States and seek readmission, case law has extended its application to resident aliens who have not left the United States. See Joseph v. INS, 909 F.2d 605, 606 n.1 (1st Cir. 1990); Francis v. INS, 532 F.2d 268 (2d Cir. 1976); Matter of Silva, 16 I. & N. Dec. 26, 30 (BIA 1976).

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOHNMARK OKEY NWOLISE,
Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

No. 91-1173

On Petition for Review of an Order of the Immigration and Naturalization Service.
(A26-204-055)

Argued: June 1, 1992

Decided: September 3, 1993

Before WIDENER and NIEMEYER, Circuit Judges, and LEGG, United States District Judge for the District of Maryland, sitting by designation.

Review denied by published opinion. Judge Widener wrote the opinion, in which Judge Niemeyer and Judge Legg joined.

COUNSEL

ARGUED: Jeffrey Andrew Bartos, Institute for Public Representation, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Petitioner. Kristen Ann Giuffreda, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Douglas L. Parker, Institute for Public Rep-

resentation, GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C., for Petitioner. Stuart M. Gerson, Assistant Attorney General, Richard M. Evans, Assistant Director, Office of Immigration Litigation, Stewart Deutsch, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

OPINION

WIDENER, Circuit Judge:

Johnmark Okey Nwolise petitions for review of an order of the Board of Immigration Appeals (the Board) denying his motion to reopen his deportation proceeding. Nwolise moved to reopen his case in order to apply for discretionary relief in the form of a waiver of deportation pursuant to section 212(c) of the Immigration and Nationality Act (the Act), codified at 8 U.S.C. § 1182(c).[1] The Board held that its previous order affirming an immigration judge's order of deportability terminated Nwolise's status as an "[a]lien[ ] lawfully admitted for permanent residence," 8 U.S.C. § 1182(c), and thus rendered him ineligible for discretionary relief under section 212(c). As we find no error, the petition will be denied.

I

Nwolise, a native and citizen of Nigeria, lawfully entered the United States as a student on February 7, 1982. After marrying a United States citizen, Nwolise was granted lawful permanent resident status on April 25, 1983. Nwolise lives with his wife and children in Baltimore, Maryland.

On October 10, 1985, a federal jury in the United States District Court for the District of Maryland convicted Nwolise of conspiracy to distribute heroin, possession with intent to distribute heroin, distribution of heroin, and related offenses. He was sentenced to a total prison term of 12 years, of which he actually served 52 months.

[1]We will conform to the apparent convention in the field of immigration law and refer to the discretionary relief provision, 8 U.S.C. § 1182(c), as section 212(c) of the Immigration and Nationality Act.

On March 2, 1989, the INS initiated deportation proceedings against Nwolise by issuing an order to show cause alleging that his narcotics convictions made him deportable under section 241(a)(11) of the Act. See 8 U.S.C. § 1251(a)(11). Nwolise's deportation hearing commenced on July 21, 1989. There he admitted the factual allegations contained in the order to show cause but denied deportability. On the strength of the record of Nwolise's narcotics convictions, the immigration judge found him deportable under the Act. Nwolise then filed an application for political asylum and withholding of deportation, and the hearing continued on those issues. Upon conclusion of the hearing the immigration judge held that Nwolise was ineligible either for political asylum or withholding of deportation and, accordingly, ordered his deportation.

On February 21, 1990, Nwolise timely filed an appeal of the deportation order to the Board. The Board found that the record supported the immigration judge's finding of deportability, his denial of asylum, and his denial of withholding of deportation. Thus, the Board dismissed Nwolise's appeal on June 5, 1991.

On June 14, 1991, Nwolise filed with the Board a motion to reopen his deportation proceeding pursuant to 8 C.F.R. §§ 3.2 and 3.8 (1992). In that motion Nwolise did not challenge the finding of deportability, the denial of asylum, or the denial of withholding of deportation; rather, he sought discretionary relief from deportation pursuant to section 212(c) of the Act. See 8 U.S.C. 1182(c). Section 212(c) provides in pertinent part as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section.

8 U.S.C. § 1182(c).[2] The plain language of the statute seems only to

[2]We note that section 212(c) was amended by the Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052. That amend-

apply to aliens returning to the U.S.; however, concerns that such an application of the statute would violate the Equal Protection component of the Fifth Amendment have led the INS and courts uniformly to hold this discretionary relief available to all eligible aliens. See, e.g., *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 I & N Dec. 26 (BIA 1976). Thus, section 212(c) allows any alien "lawfully admitted for permanent residence"[3] yet facing deportation to apply for discretionary relief upon completion of "a lawful unrelinquished domicile of seven consecutive years."

The parties do not dispute that Nwolise was lawfully admitted for permanent residence in the U.S. on April 25, 1983, following his marriage to a U.S. citizen. Nor is it disputed that Nwolise completed seven years of "lawful unrelinquished domicile" in this country on April 25, 1990, some three months after he lodged his appeal with the Board and some 13 months before the Board's decision affirming the deportation order. Instead, the dispute in this case involves the timing of Nwolise's application for discretionary relief.

Nwolise first requested discretionary relief in his motion to reopen his deportation proceeding, which he filed with the Board on June 14, 1991, nine days after the Board's denial of his appeal. By order dated August 6, 1991, the Board denied Nwolise's motion to reopen. The Board held that Nwolise became ineligible for section 212(c) discretionary relief by virtue of the Board's June 5, 1991 decision affirming the immigration judge's order of deportation. According to the Board, that decision made final Nwolise's order of deportation and thus terminated his status as an alien "lawfully admitted for permanent residence," which is a prerequisite for section 212(c) relief. Nwolise then

ment made ineligible for section 212(c) relief any alien "who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." The amendment applies only to admissions after November 29, 1990. Pub. L. No. 101-649, § 511(b). 104 Stat. 5052.

[3]The Act defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20). We discuss this definition at pp. 7-8, *infra*.

filed a timely petition for review of the Board's order. See 8 U.S.C. § 1105a(a).

Nwolise's petition raises two issues before this court.[4] First, whether a final order of deportation renders an alien ineligible for section 212(c) discretionary relief even when the order of deportation comes after the date of completion of the seven-year period of lawful unrelinquished domicile. If we answer this question in the affirmative, we then must consider at what point in the deportation process such orders become final so as to preclude an alien from obtaining section 212(c) relief. We address these questions in turn.

II

A

Before considering the substance of Nwolise's appeal, we pause to note the standard of review that governs our consideration of this case. Nwolise's claims of error raise only questions of law which, of course, this court is empowered to review *de novo*. However, even as we conduct that plenary review, we must be mindful that we are reviewing the considered judgment of the federal agency charged with interpreting and administering the statute at issue in this case. Accordingly, it is well established that the legal determinations of the Board in interpreting the Act are entitled to deference by this court. See *Udall v. Tallman*, 380 U.S. 1, 16 (1964); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Indeed, we have stated that where "the BIA's interpretation of the statutory section is neither inconsistent or unjustified, we [will] uphold the Board's construction which, in its estimation, will better serve the legislative intent and purpose." *Chiravacharadhikul v. INS*, 645 F.2d 248, 251 (4th Cir.), cert. denied, 454 U.S. 893 (1981). With these admonitions in mind, we turn to Nwolise's claims.

[4]We note that Nwolise does not seek review of the order of deportation, the denial of asylum, or the denial of withholding of deportation. His sole challenge is to the Board's denial of his application for section 212(c) relief contained in his motion to reopen.

B

Section 212(c), when read with the definitional provision of the Act, 8 U.S.C. § 1101(a), sets out two separate requirements that an alien must satisfy before he will be eligible to apply for discretionary waiver of inadmissibility or deportation. First, the alien must have completed seven consecutive years of lawful unrelinquished domicile prior to the application. As we have noted, there is no dispute in this case that Nwolise completed his seven-year domicile on April 25, 1990.

The second requirement is that the applicant alien must be "lawfully admitted for permanent residence." See text of § 212(c) at p. 3, *supra*. On their face the words "lawfully admitted for permanent residence" might suggest that an alien satisfies this requirement once and for all simply by gaining lawful permanent residence status. However, the Act defines "lawfully admitted for permanent residence" so as to make that requirement a *continuing* one. The Act provides that "[t]he term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed*." 8 U.S.C. § 1101(a)(20) (emphasis supplied).

That an order of deportability is a change in immigration status sufficient to terminate an alien's lawful permanent residence status now is clearly established. See, e.g., *Matter of Lok*, 18 I & N Dec. 101 (BIA 1981), affirmed on other grounds sub nom. *Lok v. INS*, 681 F.2d 107 (2d Cir. 1982). Further, the weight of authority supports the INS's position that the Act's use of the words "such status not having changed" commands that an alien's loss of lawful permanent residence status renders him ineligible to apply for section 212(c) discretionary relief, at least where that change in status occurs before the alien has accrued the requisite seven-year lawful unrelinquished domicile. See *Lok*, 18 I & N Dec. at 105; *Rivera v. INS*, 810 F.2d 540, 542 (5th Cir. 1987); *Variamparambil v. INS*, 831 F.2d 1362, 1366 (7th Cir. 1987); *contra Vargas v. INS*, 938 F.2d 358, 360-64 (2d Cir. 1991).

However, Nwolise argues that even if an order of deportation issued before an alien's completion of the seven-year lawful domicile

makes him ineligible for section 212(c) relief, the same result should not obtain where the order of deportation comes after the successful completion of the seven-year period. In other words, Nwolise asserts that once his eligibility for discretionary relief first was established on April 25, 1990, no subsequent change in his immigration status, including a final order of deportability, could extinguish that eligibility. We find no basis in the Act or the case law for such a distinction.

The most straightforward reading of the Act discloses no basis for a holding that once an alien has completed his seven year lawful domicile without suffering a deportation order he somehow reaches a safe harbor and gains irrevocable eligibility for section 212(c) relief. The Act's proviso that "such status not hav[e] changed" pertains not to section 212(c)'s requirement of seven years of lawful unrelinquished domicile, rather to the requirement that the applicant alien be one "lawfully admitted for permanent residence." The continuance of the status of lawful permanent residence is a requirement separate from and independent of the seven-year domicile requirement. Seven years of lawful unrelinquished domicile thus is a necessary but not sufficient condition for section 212(c) relief; the applicant, at the time of application, also must be lawfully admitted for permanent residence. Our conclusion in this regard is in accord with the decision of the Fifth Circuit which has considered this specific issue. See *Rivera*, 810 F.2d at 542.[5] Therefore, we hold that termination of an alien's lawful permanent residence status by an order of deportation, entered after the completion of the requisite seven years of lawful unrelinquished domicile, likewise terminates that alien's eligibility for section 212(c) relief.

C

Having determined that a final order of deportation renders an alien ineligible for discretionary relief under section 212(c) of the Act, we must address precisely at what point in the deportation proceeding

[5]That the deportation order in *Rivera* became final after the alien's completion of seven years of lawful unrelinquished domicile is made clear in the original panel opinion in that case, reported at 791 F.2d 1202, 1203. That opinion was vacated on rehearing and replaced by the opinion cited above.

such an order becomes "final." This question has been the subject of discussion, both within the courts that have considered it and between those courts and the INS. See generally *Variamparambil*, 831 F.2d at 1365-68; *Rivera v. INS*, 791 F.2d 1202 (5th Cir. 1986), vacated and replaced after rehearing, 810 F.2d 540 (5th Cir. 1987); *Matter of Cerna*, Appendix, 1991 BIA LEXIS 22 (BIA Oct. 7, 1991). Nwolise challenges the Board's denial of his motion to reopen in this respect on two grounds: first, that the Board's holding that his deportation order became final for section 212(c) purposes upon the Board's denial of his appeal on the merits is not supported in the Act; and second that, even if that holding is in a general sense correct, his motion to reopen the proceeding before the Board made the Board's order nonfinal and thus preserved his eligibility for discretionary relief.

As we have noted, the Act itself makes no attempt to define the moment at which lawful permanent residence ends by further defining the words "such status not having changed" of 8 U.S.C. § 1101(a)(20). Accordingly, the task of interpreting that provision quite properly has been taken up by the Board. At least since the Board's decision in *Matter of Lok*, *supra*, the position of the INS has been that such orders become final and thus effect a change in lawful permanent residence status at the time that they become "administratively final," that is, when the Board affirms an immigration judge's order of deportation or an alien, having suffered an order of deportation, allows the time for filing an appeal with the Board to run. See *Lok*, 18 I & N at 105. The Board arrived at this result after carefully examining the four events that most plausibly might trigger the end of lawful permanent residence status: (1) the immigration judge's initial determination of deportability; (2) when the immigration judge's determination becomes "administratively final," *i.e.*, when the Board affirms the order or the time for appeal lapses; (3) when a United States Court of Appeals acts on the alien's petition for review or the time for filing such a petition lapses; or (4) when the deportation order is executed by the alien's departure, voluntary or involuntary, from the U.S. *Lok*, 18 I & N at 105.

The Board quickly eliminated the first and fourth events from consideration. The Board was of opinion that terminating an alien's lawful permanent residence status upon an immigration judge's initial determination of deportability would be premature in light of the

alien's right to a *de novo* appeal before the Board. See 8 C.F.R. §§ 3.1(b)(2), 242.21; *Lok*, 18 I & N at 106. At the other end of the spectrum, the Board determined that while it had been clear that an alien lost his lawful permanent residence upon the execution of an order of deportation, it did not follow that the alien retained his lawful status until actual deportation. Rather, the Board held that where a deportable alien had exhausted all appeals but, for whatever reason, had not yet departed the country, treating that alien as a lawful permanent resident would have the "anomalous result" of extending the significant benefits attendant to lawful permanent residence status to an individual who remained in this country without any legal basis whatsoever. *Lok*, 18 I & N at 106.

The Board next considered whether an alien's lawful permanent residence status should persist through the course of an appeal from the Board's decision until the exhaustion of the appeals process in the United States Court of Appeals. After noting that the "[a]uthority to adjudicate deportability is vested primarily in the Attorney General and his delegates, the immigration judge and the Board," and that the review of the Court of Appeals is limited in scope, see 8 U.S.C. § 1105a(a)(4), the Board rejected this option. *Lok*, 18 I & N Dec. at 107. Here the Board primarily was concerned that allowing eligibility for section 212(c) relief to extend throughout the period necessary to obtain judicial review would "encourage spurious appeals to the courts" and reward aliens for prolonging an already lengthy process. Thus, the Board settled on the rule that it has employed since *Lok*: lawful permanent residence status continues until an order of deportation becomes administratively final, *i.e.*, "when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired." *Lok*, 18 I & N at 105; see also 8 C.F.R. § 243.1.

Though, as we have noted, the question of when an alien loses his status as a lawful permanent resident has aroused some discussion in the Courts of Appeal, the Board's position in *Lok* for the most part has been received favorably by the courts. See *Katsis v. I.N.S.*, No. 92-3608, ____ F.2d ____ (3rd Cir. July 6, 1993); *Rivera*, 810 F.2d at 542; *Variamparambil*, 831 F.2d at 1366; *contra*, *Butros v. I.N.S.*, No. 91-70372, ____ F.2d ____ (9th Cir. April 9, 1993) (en banc). Indeed, at least one court has held that lawful permanent residence status may

terminate even before administrative finality. See *Marti-Xiques v. I.N.S.*, 741 F.2d 350, 355 (11th Cir. 1984) (lawful permanent residence status ends on date "INS commences the deportation proceedings, *i.e.*, when the order to show cause is issued"). The Second Circuit has rejected the *Lok* rule and held that lawful permanent residence status, and thus eligibility for section 212(c) relief, continues until exhaustion of the judicial appeal process. See *Vargas*, 938 F.2d at 363-64.

After a review of the foregoing authorities we are persuaded that the Board's interpretation of the Act is entitled to deference and should be adopted as the law of this circuit. The rule in *Lok*, in the considered opinion of the Board, represents the best possible compromise between the rights of applicants for section 212(c) discretionary relief and the interest of the INS in promoting finality in deportability determinations and general efficiency in implementing the provisions of the Act. Because we find nothing in the Act to contradict the Board's interpretation, we are of opinion that declining to credit that interpretation would amount to a failure to follow the admonition of the Supreme Court that such agency determinations are entitled to deference. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Tallman, supra*, 380 U.S. at 16 (quoting *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153 (1946)). Accordingly, we reject Nwolise's general challenge to the rule in *Lok* and hold that lawful permanent residence status within the meaning of 8 U.S.C. § 1101(a)(20) ends upon the alien's exhaustion of the appeal process of the order of deportation before the Board of Immigration Appeals. In this respect, we expressly refer to the opinion of the Third Circuit in *Katsis*, supra.

Nwolise's final challenge to the Board's decision depends on the fact that he raised his claim for section 212(c) relief in a timely motion to reopen his case, which he filed nine days after the Board's affirmance on the merits of the immigration judge's order of deportation. Nwolise argues that, even under the rule in *Lok*, the filing of a motion to reopen renders the Board's decision nonfinal and thus delays the termination of his lawful permanent resident status, thereby preserving his eligibility for discretionary relief. Here Nwolise relies

primarily on some cases holding that the filing of a motion to reopen tolls the period allotted for filing an appeal to the U.S. Court of Appeals, much in the same way that the filing of motions for judgment notwithstanding the verdict and for a new trial toll the period for filing a notice of appeal under Fed. R. App. P. 4(a)(4). See the discussion and cases cited in *Pierre v. INS*, 932 F.2d 418 (5th Cir. 1991).

We are of opinion, however, that those cases discussing the effect of a motion to reopen on the finality of a Board order for purposes of the appealability of Board orders do not serve as persuasive authority on the question now before us. The question whether a particular administrative order is final so as to be ripe for appeal to this court must be answered largely through analysis of the established body of law regarding appealability of judgments to this court; whether an order is final for purposes of determining the substantive consequences of that finality under immigration law must be determined with reference to immigration law as interpreted by the INS. Thus, even were we to agree with those cases holding that the filing of a motion to reopen renders nonfinal, for purposes of appeal to this court, an order of the Board,[6] we would not be persuaded that Nwolise's motion to reopen here took the Board's order out of the rule in *Lok*. The question at hand is whether the Board reasonably determined that the Board's affirmance of a deportation order effects a change in the alien's immigration status so as to make him thereafter ineligible for discretionary relief as a matter of substantive immigration law.

We are of opinion that the same factors that counsel deference to the Board's decision in *Lok* apply to the question of the effect of a motion to reopen. Again, where the Act is ambiguous or silent on a question such as this, it is squarely within the province of the Board to fashion a rule that best serves the efficient administration of the Act. The Board has determined that to allow aliens to apply for discretionary relief in the first instance by means of a motion to reopen would be to provide a redundant procedural avenue to aliens that would be subject to abuse as a tool for injecting further delay into already protracted deportation proceedings. We find this determina-

[6]We left this question open in *Oum v. INS*, 613 F.2d 51, 53 n.2 (4th Cir. 1980).

tion no less reasonable than the general rule announced in *Lok*, and accordingly we reject Nwolise's argument to the contrary.

III

Nwolise's petition for review is accordingly

DENIED.

Oswaldo JARAMILLO, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE and The Executive Office For Immigration Review, Respondents.

No. 92-4332.

United States Court of Appeals, Eleventh Circuit.

Sept. 14, 1993.

Alien petitioned for review of order of the Immigration and Naturalization Service (INS), No. A31 356 549, ruling that he was not eligible for relief from deportation. After granting suggestion for hearing en banc, 989 F.2d 1117, the Court of Appeals, Carnes, Circuit Judge, held that point during deportation process at which resident alien's lawful domicile ends for purposes of statute authorizing attorney general to grant otherwise deportable alien with more than seven years lawful unrelinquished domicile relief from deportation is when deportation order becomes administratively final.

Reversed and remanded.

Edmondson, Circuit Judge, concurred in result.

1. Aliens ⇐53.10(1)

Point during deportation process at which resident alien's lawful domicile ends for purposes of statute authorizing attorney general to grant otherwise deportable alien with more than seven years lawful unrelinquished domicile relief from deportation is when deportation order becomes administratively final; that will be date Board of Immigration Appeals renders its decision on appeal or certification, or date appeal is waived, or date that time for appeal expires with none taken. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

2. Statutes ⇐219(1)

Court's review of agency's construction of statute is confined to whether agency's construction is a reasonable one, and court may not substitute its own construction of statutory provision for that of agency.

3. Aliens ⇐53.10(1)
Statutes ⇐219(6.1)

Board of Immigration Appeals' interpretation of statute authorizing Attorney General to grant deportable alien with more than seven years unrelinquished domicile in United States discretionary relief from deportation, determining that alien's lawful domicile ends when deportation order becomes administratively final, was reasonable and was entitled to deference. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C.A. § 1182(c).

Petition for Review of an Order of the Immigration and Naturalization Service.

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, and CARNES, Circuit Judges.

CARNES, Circuit Judge:

This appeal involves § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), which authorizes the Attorney General to grant an otherwise deportable alien discretionary relief from deportation,

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but only if the alien's period of lawful unrelinquished domicile in this country is seven years or more. The Attorney General has delegated that authority to Immigration Judges, whose decisions are reviewed by the Board of Immigration Appeals ("the Board"). *See* 8 C.F.R. §§ 212.3(e), 3.1(b)(2). The Board in this case held that Oswaldo Jaramillo was ineligible to be considered for § 212(c) relief because he did not meet the seven-year lawful unrelinquished domicile requirement. Jaramillo concedes that he is deportable but seeks review of the Board's holding that he did not meet the seven-year requirement for discretionary relief consideration.

[1] The issue presented is at what point during deportation proceedings the status of an alien lawfully admitted for permanent residence ends so that the alien is no longer accruing lawful unrelinquished domicile time for § 212(c) purposes. Giving deference to the interpretation of the statute by the Immigration and Naturalization Service ("INS"), and aligning ourselves with two other circuit courts of appeal that have addressed the issue, we hold that the point during the deportation process at which a resident alien's lawful domicile ends for § 212(c) purposes is when the deportation order becomes administratively final. That will be the date the Board renders its decision on appeal or certification, or the date an appeal is waived, or the date that time for appeal expires with none taken. Because Jaramillo had accrued seven years of lawful unrelinquished domicile before the order of deportation became administratively final, we reverse the Board's decision that he is not entitled to be considered for § 212(c) relief.

BACKGROUND

Oswaldo Jaramillo, a citizen of Colombia, entered the United States as a lawful permanent resident in 1974. He was convicted in 1976 of conspiracy to import cocaine and served a sentence of one year and one day followed by a probationary period. Jaramillo's conviction rendered him subject to deportation. 8 U.S.C. § 1251(a)(11) (1970). In 1979, when Jaramillo had been a lawful permanent resident of the United States for five years, the INS began deportation proceedings against him by issuing a show cause order. That order was mailed to Jaramillo, but was returned to the INS as undeliverable by the postal service. Nothing happened about the show cause order until Jaramillo, unaware that the INS was seeking to deport him, sought naturalization. During the course of naturalization proceedings, the show cause order was discovered in 1984. As a result of that discovery, a deportation hearing was scheduled. The INS did not serve Jaramillo with the show cause order until he appeared for his deportation hearing in 1984, by which time he had been a lawful permanent resident of this country for ten years.

At the deportation hearing, Jaramillo informed the Immigration Judge of his intention to seek relief under INA § 212(c), and he filed a timely application for relief under that section, which provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General....

8 U.S.C. § 1182(c). Under case law, discretionary relief under § 212(c) has been extended to resident aliens. *E.g., Melian v. INS*, 987 F.2d 1521, 1523 (11th Cir.1993); *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir.1976). The INS does not question that extension in this case.

The Attorney General is responsible for the administration of laws concerning immigration and naturalization, including the adoption of necessary regulations, and has delegated those responsibilities to the Commissioner of the INS. 8 U.S.C. § 1103(a), (b); 8 C.F.R. § 2.1. Immigration Judges conduct hearings on show cause orders in deportation proceedings, *see* 8 C.F.R. §§ 3.10, 242.8(a), and the Board of Immigration Appeals has appellate jurisdiction over decisions by Immigration Judges, *id.* § 3.1(b)(2). A deportation order issued by an Immigration Judge becomes final upon decision of the appeal by the Board, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken. *Id.* § 243.1. The Board's decision is administratively final, but review by the United States Circuit Court of Appeals may be sought by petition. *See* 8 U.S.C. § 1106a.

In *In re Lok*, 18 I. & N. Dec. 101, 107 (BIA 1981), *aff'd, Lok v. INS*, 681 F.2d 107 (2d Cir.1982), the Board, which is part of INS, adopted as its official interpretation of § 212(c), a construction under which an alien's period of lawful unrelinquished domicile terminates only upon entry of an administratively final order of deportation. Under the Board's *Lok* rule, Jaramillo would be eligible for consideration for § 212(c) discretionary relief, because his order of deportation did not become final until 1992, eighteen years after he had become a permanent resident. Indeed, at the time Jaramillo applied for § 212(c) relief in 1984, the order of deportation had not become final and he had already been a permanent resident for more than the requisite seven years. Jaramillo would not be eligible for § 212(c) relief if issuance of the show cause order itself served to stop the running of the lawful domicile period, because the order was issued before he had been a resident for seven years. That was the eventual holding of the Board in this case, which felt compelled in cases within this circuit to yield its interpretation of the statute in the face of two contrary decisions of this Court: *Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir.1984), and *Baillie v. INS*, 886 F.2d 306 (11th Cir. (1989), *cert. denied*, 495 U.S. 929, 110 S.Ct. 2166, 109 L.Ed.2d 496 (1990).

After the Board had announced in *Lok* that accrual of lawful residency did not stop until the deportation order became administratively final, this Court decided *Marti-Xiques*. In that case, we rejected the Board's *Lok* interpretation and adopted, instead, the date the show cause order is issued as the cutoff date for accrual of lawful domicile for § 212(c) purposes. *Marti-Xiques*, 741 F.2d at 354-55.[1]

The INS persuaded the Immigration Judge that because this case arose in the Eleventh Circuit, *Marti-Xiques* required that the cutoff date be the issuance of the show cause order, notwithstanding the Board's different interpretation of the statute. The Immigration Judge held Jaramillo ineligible for § 212(c) relief solely because of the *Marti-Xiques* decision. Jaramillo appealed to the Board, which reversed. The Board interpreted *Marti-Xiques* as establishing that the commencement of deportation proceedings is the event which stopped

1. Although we announced a rule different from the Board's interpretation, the actual result in *Marti-Xiques* was consistent with the Board's position. The alien in that case had been a lawful resident for less than seven years when the deportation decision became administratively final. *See* 741 F.2d at 351. Thus, he was ineligible for § 212(c) relief under the Board's interpretation as well as under the earlier cutoff rule we adopted.

accrual of lawful residency time, and the Board held that under regulations in effect at the time of the *Marti-Xiques* decision, deportation proceedings did not commence until the show cause order was served as well as issued. *See* 8 C.F.R. § 242.1(a) (1984). Because service did not occur in this case until after Jaramillo had been a lawful resident for more than seven years, the Board concluded that he was eligible for § 212(c) consideration.

After the Board reversed and remanded this case to the Immigration Judge, we decided *Ballbe v. INS*, which reiterated and clarified the rule of law set forth in *Marti-Xiques*. We held in *Ballbe* that the date lawful residency ceases to accrue for § 212(c) purposes is the date that the show cause order is issued, not the date it is served. 886 F.2d at 309. The INS then used our *Ballbe* decision to argue before the Immigration Judge in this case that notwithstanding the Board's mistaken reading of *Marti-Xiques*, it was now clear that for § 212(c) purposes issuance of the show cause order was the crucial date in deportation proceedings undertaken in the Eleventh Circuit. Under that rule, Jaramillo was ineligible for § 212(c) relief because at the time the show cause order was issued, he had been in the United States as a lawful permanent resident for only five years. The Immigration Judge agreed with the INS, and applied *Ballbe* to preclude consideration of the merits of Jaramillo's previously filed § 212(c) application. The Board, in light of *Ballbe*, upheld the Immigration Judge's decision and dismissed the appeal. Jaramillo petitioned for review by this Court.

The INS succeeded in convincing the Immigration Judge and the Board to apply our *Marti-Xiques* and *Ballbe* decisions to deny consideration of Jaramillo's § 212(c) application. Nonetheless, the INS has now acquiesced in Jaramillo's suggestion for hearing en banc in this case, 989 F.2d 1117, and has informed this Court that it agrees that we should defer to the Board's interpretation of § 212(c) and overrule our two contrary decisions. This change in position by the INS, coupled with the existence of an intercircuit conflict between the Fifth and Seventh Circuits' holdings on the issue and ours in *Marti-Xiques* and *Ballbe*, prompted us to hear this case en banc in order to consider whether those two decisions should be overruled.

DISCUSSION

The problem with our *Marti-Xiques* and *Ballbe* decisions is that they do not pay sufficient heed to Supreme Court precedent which commands us to defer to the interpretation of a statute by the agency charged with administering it, so long as the agency's interpretation is reasonable and is not inconsistent with the language of the statute or congressional intent. The Supreme Court set forth the rule of deference in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), which described a court's duty in reviewing an administrative agency's construction of a statute as a two-step process. First, the court is to determine if the intent of Congress is clear; if so, that is the end of the matter. On the other hand, if Congress has not spoken directly to the precise question at issue, a second step of review comes into play, and the court must determine whether the agency's answer to the question Congress left open reflects a permissible construction of the statute. *Id.* at 842–43, 104 S.Ct. at 2781–82.

[2] Congress did not speak directly to the precise issue of when lawful domicile ends for § 212(c) purposes, so we are past the first step of the *Chevron* analysis. This case is about the second step: determining whether the agency's construction of the statute is a permissible one. Under *Chevron* a court is not to search for what in the court's view is the best possible construction of the statute: "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n. 11, 104 S.Ct. at 2782 n. 11. Instead, a court's review is confined to whether the agency's construction is a reasonable one, and the court may not substitute its own construction of a statutory provision for that of the agency. *Id.* at 844, 104 S.Ct. at 2782. Realizing that administrators and judges might well disagree about the wisdom of a policy behind an agency's construction of a statutory provision, the Supreme Court admonished courts not to forget to whom the authority and responsibility for such policy making is entrusted:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195, 98 S.Ct. 2279, 2302 [57 L.Ed.2d 117] (1978).

Id. at 866, 104 S.Ct. at 2793.

The *Chevron* rule of deference is fully applicable to the immigration area. Indeed, even before its *Chevron* decision, the Supreme Court had held that courts are required to defer to the Board of Immigration Appeals' interpretation of the INA. *INS v. Jong Ha Wang*, 450 U.S. 139, 101 S.Ct. 1027, 67 L.Ed.2d 123 (1981), involved the Board's interpretation of INA § 244, 8 U.S.C. § 1254(a)(1). That section provides the Attorney General and her delegates with discretion to suspend the deportation and adjust the status of an alien when three requirements are met, one of which is that the deportation would result in "extreme hardship." *Id.* at 140–41, 101 S.Ct. at 1029. The Board had construed that statutory term narrowly, but on appeal the Ninth Circuit disagreed, expressing its preference for a more liberal construction. The Supreme Court reversed, explaining:

> [T]he Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates. The crucial question in this case is what constitutes "extreme hardship." These words are self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.

Id. at 144, 101 S.Ct. at 1031. The Supreme Court held that the Attorney General's delegates had the authority to construe "extreme hardship" narrowly should they deem it wise to do so, which is what had occurred. *Id.* at 145, 101 S.Ct. at 1031; *see also INS v. Rios-Pineda*, 471 U.S. 444, 451, 105 S.Ct. 2098, 2103, 85 L.Ed.2d 452 (1985) (applying *Wang*'s

deference holding to the Board's interpretation of INA § 244(a)(1)'s requirement of physical presence "for a continuous period of not less than seven years.").

The teaching of *Chevron* and *Wang* apply to the present case. In the words of *Chevron*, Congress left a "gap" in § 212(c): it failed to specify the event that marks the end of the period of lawful unrelinquished domicile, and the Board filled that gap by interpreting the statute to mean that the period ends when a deportation order becomes administratively final. *In re Lok*, 18 I. & N. Dec. at 105. In the words of *Wang*, the phrase "lawful unrelinquished domicile" is "not self-explanatory, and reasonable men could easily differ" about its interpretation.

[3] When this Court reviews the manner in which the INS, i.e., the Board, has filled the gap in § 212(c), *Chevron* says we may not "substitute [our] own construction of a statutory provision for a reasonable interpretation" by the agency. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782. In such a case, "the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." *Id.* at 843, 104 S.Ct. at 2782 (emphasis added). We must defer to the Board, even if its construction of § 212(c) is not the one we would choose, so long as the Board's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845, 104 S.Ct. at 2783 (quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). Likewise, *Wang* prohibits us from casting aside the Board's interpretation of § 212(c) "simply because [we] may prefer another interpretation of the statute." 450 U.S. at 144, 101 S.Ct. at 1031.

The reasonableness of the Board's action in filling the gap Congress left in § 212(c) is evident from the reasoning process the Board followed in deciding where along the spectrum of possibilities the cutoff point for an alien's accrual of lawful residence time should be. *See In re Lok*, 18 I. & N. Dec. at 105–07. The Board began by ruling out the two extremes, and then moving away from those two extremes, the Board eliminated possibilities until it reached what it deemed to be a good cutoff point. One extreme, the earliest possible cutoff point, is the occurrence of the act or event leading to deportation. Prior Board decisions on related issues had established that an alien's lawful status does not change that early, and the Board chose to be consistent. *Id.* at 106. Moving forward through the deportation process, the Board also rejected as a cutoff point the Immigration Judge's adjudication that the alien is due to be deported. The Board reasoned that such a cutoff would be premature, because on appeal the Board is not bound by the decisions of Immigration Judges concerning deportability, but instead reviews the record of each case de novo. *Id.* At the far end of the spectrum, the Board rejected the other extreme, which would be the date the alien departs the United States after having been ordered deported. The Board reasoned that permitting an alien under a final order of deportation to remain a lawful permanent resident would be "inherently incongruous," because that would allow a clearly deportable alien to continue to enjoy benefits, such as visa preferences for relatives, to which the alien was no longer entitled. *Id.* Moving back one step in the process, the Board decided that permitting lawful residence time to accrue pending review by the court of appeals would be unacceptable, because the appellate courts' scope of review is limited to errors of law or unfairness in procedure, instead of the de novo review conducted by the Board, and reversals of Board decisions are "relatively rare." Under these circumstances, allowing lawful residence time to continue accruing during the judicial review process would encourage spurious appeals. *Id.* at 107. As a middle ground, in between the other possibilities it rejected, the Board chose as the cutoff date the time at which the deportation decision becomes administratively final. As the Board explained, because "[a]uthority to adjudicate an alien's deportability is vested primarily in the Attorney General and his delegates, the immigration judge and the Board," their decisions are the primary components in the process. *Id.* Thus, the Board concluded that:

> the policies of the Act would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation—generally, when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired.

Id. at 105.

The Fifth and Seventh Circuits have each deferred to the Board's construction of § 212(c), which it initially announced in *Lok*. The Fifth Circuit explained its decision as follows: "The *Lok* opinion, which the Board followed in the instant case, reflects careful consideration of the solution to the problem of when lawful residence in this country should terminate. We find nothing unreasonable about the [Board's] rationale or its conclusion." *Rivera v. INS*, 810 F.2d 540, 541 (5th Cir.1987). The Seventh Circuit, after reviewing the Board's *Lok* decision, reached the same conclusion. *Vanamparambil v. INS*, 831 F.2d 1362, 1367 (7th Cir. 1987) ("We agree with the Fifth Circuit that the Board's interpretation of § 212(c) is reasonable and reflects a careful consideration of the alternatives."). No decision of which we are aware has held that the Board's interpretation of § 212(c) establishing the cutoff date for accrual of lawful domicile status is unreasonable.[2]

The Board's interpretation of the statute is not necessarily the one we would choose were the choice ours to make. Indeed, our prior decisions in *Marti–Xiques* and *Ballbe* reflect a preference for a different interpretation. Nonetheless, we agree with the Fifth and Seventh Circuits that the Board's interpretation is reasonable and permissible. Under *Chevron* and *Wang* our inquiry stops there. We are required to defer to the Board, and we do so. The Board's rule is now the rule in this Circuit: lawful unrelinquished domicile status for § 212(c) purposes ends when the deportation order becomes administratively final, as specified in the Board's opinion in *In re Lok*, 18 I. & N. Dec. 101 (BIA 1981).

Not only does our conclusion today help heal an intercircuit split, it also will help achieve nationwide uniformity in an area of

2. Upon review of the Board's decision in *Lok* itself, the Second Circuit in dictum expressed the belief that Lok's lawful domicile period "may" have ended when he conceded deportability instead of when the Board thereafter decided the appeal involving denial of his § 212(c) relief request. *Lok v. INS*, 681 F.2d 107, 110 (2d Cir. 1982). Coming as it did prior to *Chevron*, the Second Circuit's *Lok* opinion contains no analysis of whether the Board's construction of the statute is reasonable, and the Second Circuit's dictum is unpersuasive for that reason. The Fifth and Seventh Circuit decisions, on the other hand, were informed by *Chevron*, and we agree with their holdings.

the law where uniformity is particularly important. The Board has expressed concern over the inconsistent application of § 212(c) which resulted in large part from our prior decisions in *Marti-Xiques* and *Bulbe*. Noting that "a principal mission of the Board of Immigration Appeals is to ensure as uniform an interpretation and application of this country's immigration laws as is possible," the Board stated in *In re Cerna*, No. A-30257519, slip op. at 10 (BIA Oct. 7, 1991) (Appendix), that the division among the circuits was making that goal unattainable. The result of the split of authority, the Board wrote, was that an alien's eligibility for § 212(c) relief depended upon where a case arises. *Id.* at 13. While admitting that "this is not an issue in which there is an obviously correct or incorrect answer," *id.* at 14, the Board nonetheless described a genuine problem:

> The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue. Here, however, we are left with a patchwork application of the law—with the most profound decisions affecting aliens (all of whom in this context have been lawful permanent residents of the United States) tied to the mere happenstance of where their cases arise geographically.

Id. By deferring to the Board's interpretation of § 212(c), as we are required to do by the *Chevron* and *Wang* decisions, we have aligned ourselves with the Fifth and Seventh Circuits, thereby doing what we can to make possible a uniform nationwide application of the immigration laws.

CONCLUSION

Because Jaramillo had been a lawful permanent resident of this country for more than seven years at the time his deportation order became administratively final, he is eligible to be considered for discretionary relief under § 212(c). But nothing we say is meant to imply in the least that the Attorney General and her delegates should grant Jaramillo relief from deportation. He is a convicted felon. He conspired to import cocaine into this country. Under the law, the Attorney General and her delegates must consider Jaramillo's request for relief, but they remain free to deny that request. *Cf. INS v. Rios-Pineda*, 471 U.S. 444, 450, 105 S.Ct. 2098, 2102, 85 L.Ed.2d 452 (1985) (noting Attorney General's broad discretion over decisions to suspend deportation orders under INA § 244(a)(1), 8 U.S.C. § 1254(a)(1)).

The decision of the Board of Immigrations Appeals that Jaramillo is ineligible to be considered for § 212(c) discretionary relief is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

EDMONDSON, Circuit Judge, concurs in the result.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

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In the
United States Court of Appeals
For the Seventh Circuit

No. 92-3081

DAMIAN PEREZ-RODRIGUEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals.
No. A34 502 348

ARGUED APRIL 28, 1993—DECIDED AUGUST 25, 1993

Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and EISELE, *Senior District Judge*.*

COFFEY, *Circuit Judge*. Damian Perez-Rodriguez ("Perez"), petitions for review of a decision of the Board of Immigration Appeals ("BIA"). The BIA affirmed the immigration judge's finding that Perez was deportable under the Immigration and Nationality Act, *see* 8 U.S.C. § 1251(a)(1)(A) (1988 & Supp. IV 1992), because he reentered the United States following an earlier deportation

* The Honorable Garnett Thomas Eisele, Senior District Judge of the United States District Court for the Eastern District of Arkansas, is sitting by designation.

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1977. "Lawful, permanent resident" is defined in 8 U.S.C.

without the Attorney General's permission, *see* 8 U.S.C. § 1182(a)(6)(A) (1988 & Supp. IV 1992), and without valid entry documents, *see* 8 U.S.C. § 1182(a)(7)(A)(i)(I) (1988 & Supp. IV 1992). We deny the petition for review.[1]

I. BACKGROUND

Perez is a forty-six-year-old native and citizen of Mexico who was admitted into the United States as a lawful, permanent resident in November of 1974. On April 13, 1977, Perez was ordered deported for entering the United States on March 29, 1977, without inspection in violation of 8 U.S.C. § 1251(a)(1)(B) (1988 & Supp. IV 1992). He was deported to Mexico on July 25, 1977, but his stay in that country was rather short—he reentered the United States at Eagle Pass, Texas, later that same day. He was not questioned by officials upon his return, and he entered upon his claim of lawful, permanent residency. In June of 1978 Perez was convicted of smuggling an alien into the United States in violation of 8 U.S.C. § 1324(a)(2) (1988). For this he served sixteen months of a three-year term of imprisonment. In August of 1979 the Immigration and Naturalization Service ("INS") issued an order to show cause why Perez should not be deported, charging that Perez was deportable under 8 U.S.C. § 1182(a)(6)(A), for having entered the United States following his deportation without the Attorney General's consent. Nearly seven years later, in July of 1986, the INS added to its order to show cause a charge that Perez was deportable because he had entered the United States without the immigration documents required by 8 U.S.C. § 1182(a)(7)(A)(i)(I).

[1] The immigration judge rendered his decision in 1987, three years before Congress' amendments to 8 U.S.C. §§ 1182(a) and 1251(a). The amendments decreased the number of classes of excludable aliens from thirty-four to nine by broadening the descriptions of the classes. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 5066-85. Because the amendments simply reorganized the two provisions and did not substantively change them,

In May of 1987 an immigration judge ruled that Perez was deportable on the basis of both charges brought by the INS. He found that Perez was deportable on the basis of 8 U.S.C. § 1182(a)(7)(A)(i)(I), because Perez's prior deportation had nullified his immigrant visa and, as such, Perez had entered the United States without a valid entry document. He also found that Perez was deportable on the basis of 8 U.S.C. § 1182(a)(6)(A), because Perez had not procured the Attorney General's consent to enter the United States. Perez sought retroactive permission to enter the United States after deportation or, alternatively, to depart the United States voluntarily. The immigration judge found that he lacked the authority to entertain Perez's application for retroactive permission to enter the United States because Perez was deportable on more than one ground. He also found that Perez was not entitled to an order allowing him to depart the United States voluntarily because the factors that would favor voluntary departure (Perez was married to a woman who was a United States citizen and had three children who also were United States citizens) were outweighed by the factors that would disfavor it (Perez had two criminal convictions and had misrepresented his criminal record during the hearing).

Perez appealed the immigration judge's decision to the BIA. The BIA affirmed the judge's decision, concluding that Perez was deportable on the basis of 8 U.S.C. § 1182(a)(7)(A)(i)(I), because Perez's status as a lawful, permanent resident terminated on April 13, 1977, when the INS entered a final order of deportation and, as such, when Perez reentered the United States on July 25, 1977, he did so without valid immigration documents. The BIA also agreed with the immigration judge's finding that he lacked the authority to entertain Perez's application for retroactive permission to enter the United States. The BIA stated that retroactive permission can be granted only if by granting it the sole ground of deportability or inadmissibility would be eliminated. In this case, the BIA noted, granting Perez retroactive permission to en-

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of deportability or inadmissibility because Perez was deportable on two grounds: for entering the United States without the Attorney General's permission *and* for entering without valid entry documents. Perez timely filed a petition for review of the BIA's decision.

II. ISSUES

Perez raises three issues in his petition for review. He first contends that, contrary to the position taken by both the immigration judge and the BIA, he did not lose his status as a lawful, permanent resident when the INS ordered him deported on April 13, 1977, and he therefore was not deportable under 8 U.S.C. § 1182(a)(7)(A)(i)(I), for entering the United States with an invalid immigrant visa. Perez also contends that he should have been granted retroactive permission to enter the United States or, alternatively, that he should have been allowed to depart the United States voluntarily.

III. DISCUSSION

Authority to adjudicate an alien's deportability is vested primarily in the Attorney General and his delegates, the immigration judge and the BIA. *Variamparambil v. INS*, 831 F.2d 1362, 1366 (7th Cir. 1987) (quoting *In re Lok*, 18 I & N Dec. 101, 107 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982)). Although the alien is entitled to seek review of an adverse decision in the Court of Appeals, the scope of judicial review is limited. *Id.* Absent an error of law or unfairness in procedure, the court must affirm the administrative order of deportation if the order is supported by "reasonable, substantial, and probative evidence." 8 U.S.C. § 1105a(a)(4) (1988); *Howard v. INS*, 930 F.2d 432, 434 (5th Cir. 1991); *Variamparambil*, 831 F.2d at 1366.

Perez first argues that the BIA erred in ruling that he lost his status as a lawful, permanent resident when the INS entered the final order of deportation on April 13,

§ 1101(a)(20) (1988), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with immigration laws, *such status not having changed*." (emphasis added). Perez was admitted into the United States as a lawful, permanent resident in November of 1974 and retained that status unless it "changed" within the meaning of § 1101(a)(20). The BIA concluded that Perez's status as a lawful, permanent resident "changed" upon entry of the final order of deportation on April 13, 1977, because once the order was entered Perez's privilege of residing in the United States permanently was terminated (barring, of course, a reversal on the merits of the finding of deportability by a court). If the BIA's position is correct, then Perez's reentry into the United States on July 25, 1977, clearly violated 8 U.S.C. § 1182(a)(7)(A)(i)(I), because the immigrant visa that he used to reenter the United States was invalid. The question therefore becomes whether the BIA's interpretation of § 1101(a)(20) is reasonable.

In answering this question we work within the now-familiar framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We first determine whether the plain language of the statute dictates a certain answer to our question. "The plain language of the statute should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). If the plain language of the statute is ambiguous or silent on the issue then we must determine whether Congress delegated to the INS the authority to make the legal interpretation in issue. *Chevron*, 467 U.S. at 843-44; *see also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411-12 (7th Cir. 1987). If Congress intended no such delegation, we must interpret the statute with little deference to the INS's

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must make a third inquiry: "whether the [INS's] answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. So long as the INS's interpretation is reasonable, we must defer to that interpretation and not impose our own construction on the statute. *Id.*

The plain language of § 1101(a)(20) is silent on precisely when an alien's status as a lawfully admitted resident is "changed." And nothing else in the Act explains what Congress intended. We therefore must determine whether Congress delegated to the INS the authority to interpret when a change in status occurs. Certainly Congress delegated such authority to the Attorney General through 8 U.S.C. § 1103(a) (1988), which states:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.*

(emphasis added). The Attorney General, in turn, "may require or authorize any employee of the [Immigration and Naturalization] Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the [Immigration and Naturalization] Service." 8 U.S.C. § 1103(a). The Attorney General delegated the authority to interpret the Immigration and Naturalization Act to the BIA in 8 C.F.R. § 3.1(d) (1993). *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

Thus, having determined that the BIA has the delegated authority to interpret 8 U.S.C. § 1101(a)(20), we must determine whether the BIA's interpretation of the provision to mean that an alien loses his status as a lawful,

permanent resident upon the entry of a final order o
deportation is based upon a permissible construction o
the statute. It is. The BIA's interpretation is based o
its decision in *In re Lok*, 18 I & N Dec. 101 (BIA 1981)
aff'd, 681 F.2d 107 (2d Cir. 1982), and its subsequent dec
sions in *In re Gunaydin*, 18 I & N Dec. 326 (BIA 1982
and *In re Cerna*, Interim Decision 3161 (BIA 1991). I
In re Lok, the BIA considered four possible steps in th
deportation process when the status of an alien admitte
for permanent residence might terminate: (1) when th
immigration judge ordered the alien deported; (2) whe
the immigration judge's deportation order became admin
istratively final; (3) when the court of appeals acted upo
a petition for review of the BIA's order or the time al
lowed for filing a petition expired; or (4) upon the execu
tion of the deportation order by the alien's departure fro
this country. 18 I & N Dec. at 105. The BIA reasone
that terminating the alien's status as a lawful residen
after the immigration judge's adjudication of deportabilit
would be premature because the BIA has the statutor
obligation to conduct a *de novo* review of the immigra
tion judge's findings of fact and conclusions of law. *Id*
at 106-07. It ruled out extending an alien's status as
lawful resident past the time an order of deportation be
comes administratively final because doing so would en
courage spurious appeals to the courts, made solely fo
the purpose of delaying deportation. *Id.* at 107. The BIA
concluded that "the policies of the Act would best be serve
by deeming the lawful permanent resident status of a
alien to end with the entry of a final administrative orde
of deportation." *Id.* at 105.

In *Variamparambil v. INS*, 831 F.2d at 1366-67, we
found this interpretation to be reasonable, at least as it
applies to 8 U.S.C. § 1182(c) (1988 & Supp. IV 1992). Sec
tion 1182(c) states in pertinent part that "[a]liens lawful
ly admitted for permanent residence . . . returning to
lawful unrelinquished domicile of seven consecutive years
may again be admitted in the discretion of the Attorney
General without regard to [the alien's deportability under

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8 U.S.C. § 1182(a)]." The issue in *Variamparambil* was whether the alien's status as a lawful, permanent resident had terminated before the seven-year period. In ruling that it had, we stated that the BIA's conclusion in *In re Lok* that an alien's status as a lawful, permanent resident ends, for purposes of § 1182(c)'s seven-year period, upon the entry of an administratively final order of deportation is "reasonable" and "reflects a careful consideration of the alternatives." *Id.* at 1367. The Fifth Circuit agrees. *See Rivera v. INS*, 810 F.2d 540-41 (5th Cir. 1987), *vacating on reh'g* 791 F.2d 1202 (5th Cir. 1986). Perez has not come up with a reason why the point at which an alien's status as a lawful, permanent resident terminates should be any different in cases, like this one, that do not involve § 1182(c). Neither have we. What we said in *Variamparambil* is equally valid in this case: The BIA's conclusion that an alien's status as a lawful, permanent resident terminates upon the entry of an administratively final order of deportation is reasonable.

Perez's status as a lawful, permanent resident terminated on April 13, 1977, when he was ordered deported for entering the United States without inspection. Therefore, when Perez entered the United States on July 25, 1977, he did so with an invalid immigrant visa in violation of 8 U.S.C. § 1182(a)(7)(A)(i)(I), and the BIA properly concluded that Perez was deportable on the basis of that violation of the immigration laws.

We proceed to the second issue in this case, whether Perez should have been granted retroactive permission to enter the United States. The BIA held that it and the immigration judge lacked the authority to grant Perez such relief. The BIA's general powers are described in 8 C.F.R. § 3.1(d)(1) (1993): "Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise *such discretion and authority* conferred upon the Attorney General by law *as is appropriate and necessary for the disposition of the case.*" (emphasis added). The BIA interprets the italicized language to mean that

it and the immigration judges possess only such discretion and authority as is necessary to dispose of cases. *See In re Vrettakos*, 14 I & N Dec. 593, 597 (BIA 1973); *Matter of S-N-*, 6 I & N Dec. 73, 75 (BIA 1954, AG 1954). Thus the BIA has repeatedly held that neither it nor immigration judges have the authority to entertain applications for retroactive permission (or, for that matter, advance permission) to enter the United States "unless granting the application would completely dispose of the case." *Vrettakos*, 14 I & N Dec. at 597; *see also In re Ng*, 17 I & N Dec. 63, 63 (BIA 1979) ("We have held that immigration judges and the Board on review have the power to grant permission to reapply for admission retroactively where such action is necessary for the complete disposition of the case."). Granting an application for retroactive permission to enter the United States does not "completely dispose of the case" unless the grant eliminates the only ground of deportability or inadmissibility.

Clearly if the BIA's interpretation of 8 C.F.R. § 3.1(d) (1993), is a valid interpretation, the BIA lacked the authority to entertain Perez's request for retroactive permission to apply for admission into the United States. Perez was deportable on *two* grounds: first for having entered the United States after his deportation without the Attorney General's consent (8 U.S.C. § 1182(a)(6)(A)), and second, as we established above, for having entered the United States without valid entry documents (8 U.S.C. § 1182(a)(7)(A)(i)(I)). Therefore, granting Perez retroactive permission to apply for admission into the United States would not have eliminated the only ground of deportability.

The BIA's interpretation of § 3.1(d) is valid. An agency's construction of its own regulations is entitled to substantial deference. *Lyng v. Payne*, 476 U.S. 926, 939 (1986). In construing administrative regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)); *see also INS*

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v. Stanisic, 395 U.S. 62, 72 (1969). The BIA's construction of 8 C.F.R. § 3.1(d), that granting an alien retroactive permission to enter the United States is not "appropriate and necessary for the disposition of the case" unless doing so would completely dispose of the case, is consistent with the wording of the regulation. Surely the regulation is open to other interpretations; however, we need not conclude that the interpretation adopted by the BIA is the only one that it permissibly could have adopted to uphold the BIA's construction. *Chevron*, 467 U.S. at 843 n.11.

Finally, as an alternative to receiving retroactive permission to enter the United States, Perez argues that he should have been allowed to depart the United States voluntarily. Perez did not include this argument in his appeal to the BIA. His notice of appeal to the BIA states that:

> The Immigration Judge erred when he decided that the *nunc pro tunc* request to reapply after deportation would not resolve the final issue in this case, where the respondent had entered in violation of Section 212(a)(17) [now section 212(a)(6)(A)] of the Act. Likewise, the allegation of entry in violation of Section 212(a)(20) [now section 212(a)(7)(A)(i)(I)] was clearly not applicable to this respondent as he had been a permanent resident of the U.S. since approximaely [sic] 1974. The position of the I.J. that the 2nd charge precluded termination of the proceedings upon grant of the *nunc pro tunc* request, is clearly erroneous.

In the brief that he submitted to the BIA, Perez framed the issue as follows: "Did the Immigration Judge err in not granting nunc pro tunc permission to re-apply for admission into the United States after Deportation?" Moreover, in its order affirming the decision of the immigration judge the BIA noted that "[t]he only issues which have been raised on appeal are the immigration judge's finding that the respondent is deportable under section 241(a)(1) of the Act, through section 212(a)(20) of the Act, and his denial of the application for retroactive permission to reapply for admission after deportation."

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Perez contends that the immigration judge erroneously denied his application for voluntary departure, and that the BIA erred by not reviewing the application. In reviewing a case on appeal from an immigration judge *de novo*, the BIA makes its own conclusions as to the facts and evidence. *See Rivera*, 810 F.2d at 541. But it cannot be expected to resolve issues that the alien should have raised, but did not. Indeed, the BIA can summarily dismiss an alien's appeal if the alien inadequately informs it of what aspects of the immigration judge's decision were allegedly incorrect and why. 8 C.F.R. § 3.3(1-a)(i)(A) (1993); *Martinez-Zelaya v. INS*, 841 F.2d 294, 296 (9th Cir. 1988); *Bonne-Annee v. INS*, 810 F.2d 1077, 1078 (11th Cir. 1987); *Townsend v. INS*, 799 F.2d 179, 181-82 (5th Cir. 1986). Perez failed to inform the BIA that he sought to challenge the immigration judge's decision not to allow him to depart the United States voluntarily. As such, the BIA properly declined to review that decision.

Perez devotes a good portion of his brief to arguments why the immigration judge should have allowed him to depart the United States voluntarily. Nevertheless, because Perez did not initially present these arguments to the BIA, we cannot consider them. The Immigration and Nationality Act provides: "An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as a matter of right under the immigration laws and regulations . . . ." 8 U.S.C. § 1105a(c) (1988). By neglecting to present his claim to the BIA that the immigration judge should have allowed him to depart the United States voluntarily, Perez failed to exhaust his administrative remedies as is required by the Act. Because the exhaustion requirement is jurisdictional, *see Athehortua-Vanegas v. INS*, 876 F.2d 238, 240 (1st Cir. 1989); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1488-89 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986), we lack jurisdiction to consider whether Perez should be allowed to depart voluntarily.

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No. 93-423

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STAVROS KATSIS, Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent's Argument, that the Questions Presented Will Soon Be Resolved by Rulemaking, is Unsupported in the Record and is Incorrect as a Matter of Law

Respondent's Brief, conceding as it must that the Circuit Courts of Appeal are in conflict on this issue, and that the issue is important, seeks to avoid this Court's review solely by asserting that "regulations are expected to be issued in the near future [which] will specifically address the question presented by the certiorari petition in this case." Respondent's Brief at 7.[1] Respondent effectively acknowledges that the case is "certworthy, but" a rulemaking is promised to resolve the issue. This assertion has neither record support and nor authorization under the statute cited, Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066.

The Record

Respondent asserts that regulations to address the question presented here will be issued "soon". However, nothing in the record suggests that this is the case. Respondent has not cited

1. The Petition for Certiorari presented three questions; however, Respondent's Brief addresses only the first, i.e. conflict among the Circuits on an issue of importance. This Reply Brief is therefore limited to discussion of that question; however, Petitioner submits that the other two questions are independently deserving of this Court's consideration.

any Notice or Proposed Rulemaking in the Federal Register, has not appended any affidavit or letter, has not submitted any support for its assertion that regulations dispositive of the issue are wending their way through the Department. To support its assertion that such regulations are "expected", Respondent cites nothing other than the authority given to the Attorney General over three years ago, in Section 545(d) of the Immigration Act of 1990, supra. The text of that statute (omitted from Respondent's Brief) demonstrates the opposite conclusion.

The Statute

Section 545(d), which was effective as of November 29, 1990, reads:

> REGULATIONS ON MOTIONS TO REOPEN AND TO RECONSIDER AND ON ADMINISTRATIVE APPEALS.--Within 6 months after the date of the enactment of this Act, the Attorney General shall issue regulations with respect to--
> (1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions; and
> (2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation.

This enactment does not authorize the promulgation of regulations dispositive of the issue presented here. Rather, the subject of §545(d) is limitations on the number of motions and the maximum

calendar time period in which motions may be filed. (Presently there is no time limit.) This was the issue raised in INS v. Abudu, 485 U.S. 94 (1988), cited in Respondent's Reply Brief at 4. Congress mandated the Attorney General to devise procedural regulations to prevent repetitive and/or dilatory motions -- procedural regulations which were to apply irrespective of the remedy sought. It did not contemplate or include authority to regulate substantive eligibility for relief under Section 1182(c), the issue raised by this Petition and on which the Circuits have divided.

Moreover, Congress gave the Attorney General six months in which to promulgate such regulations. As Respondent acknowledges, that mandate expired in the Spring of 1991. Respondent's Brief at note 8. Years have passed; the Attorney General has never asked for an enactment to extend this authority, which by its terms has expired.

Thus, the "expected" regulations would be neither relevant nor, at this late date, even authorized as the Respondent suggests.

The Split among the Circuits Cannot be Resolved by Regulation

Respondent's sole argument against certiorari is that the split among the Circuits need not be resolved by this Court, since the Attorney General can and will resolve the matter by regulation. This position is based on Respondent's assertion that "[e]ach of the courts of appeals that has rejected the government's position

has relied heavily on the notion that [the government's position] ... is inconsistent with the unqualified provision in 8 C.F.R. 3.2 authorizing motions to reopen." In fact the opinions in question held the government's position not only inconsistent with Section 3.2, but invalid on other, non-regulatory grounds as well.

Henry v. INS, Nos. 91-2252, 92-1476, and 92-2801 (7th Cir. October 15, 1993) rejected the government's assertion there, that its position was a reasonable barrier against dilatory, self-serving motions to reopen (the assertion which is the basis of Respondent's 545(d) argument). Specifically referring to the Third Circuit's opinion in the instant case, the Seventh Ciruit stated at pp. 20-21:

> We find Katsis problematic in several respects. First, it assumes that aliens always manufacture equities to support their applications for a discretionary waiver of deportation and that they have ample time to engage in such "manipulation" before a final administrative order of deportation is issued....We do not share the Third Circuit's view that all evidence weighing in favor of an alien has somehow been manufactured. Although some evidence relevant to the section 212(c) inquiry may be subject to manipulation ... Katsis fails to account for cases where circumstances change with no help from the alien.... We also cannot simply dismiss the evidence as probably immaterial, as Katsis suggests. That concern [regarding "manufactured" evidence] therefore does not justify a rule precluding all evidence of changed circumstances at the outset. (at 20-21) [2]

2. Although the Third Circuit was cynical about Petitioner's new evidence, the Board of Immigration Appeals was not, characterizing it as "new evidence that would serve to bolster his equities for a discretionary determination under Section 212(c) of the Act." Appendix C to the Petition at p. 27a (emphasis added).

PUBLISHER'S NOTE:

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Goncalves v. INS, 6 F.3d 830 (1st Cir. 1993) rejected the Government's position "for the following three reasons, taken together." (Id. at 832, emphasis added). In addition to holding that the government's position was (1), inconsistent with 8 C.F.R. §3.2, the First Circuit held that it was (2) an unreasonable interpretation of the statute, not entitled to deference under the Chevron doctrine and (3) not a reasonable means of avoiding dilatory and abusive motions. Thus, Section 3.2 is by no means the sole issue.[3]

Petitioner requests that certiorari be granted, because the issues raised in this Petition cannot simply be resolved by rulemaking, even assuming that the statutory delegation of authority in Section 545(d) was still viable.

Alternatively, if the Court finds that Respondent's position has merit, the decision on this petition might be deferred until the promised regulations are promulgated and made available for this Court's consideration.

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3. Neither the second nor the third resons "defers" to the Board as did the Third Circuit in the instant case. Mere citation of Chevron is cannot resolve the issue presented, since the Circuits are split on the application of Chevron as well.

Respondent has invited the Court's attention to its brief opposing certiorari in Ghassan v. I.&N.S., cert. denied, 113 S.Ct. 1412 (1992), which also promised, in February 1993, that regulations would soon resolve this issue. In contesting certiorari, Respondent argued at length that Mr. Ghassan was unworthy of Section 1182(c) discretionary relief. The Solicitor General raises no such argument with respect to this petitioner. His equities the Board itself recognized. His eligibility to be considered for relief would be clear under the law of the First, Second, Seventh and Ninth Circuits. Unless granted relief he will be deported and excluded for life, depriving an American family of their husband, father, and breadwinner.

WHEREFORE, Petitioner requests that certiorari be granted.

Respectfully submitted,

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December 22, 1993